Docket for 02-693

(8)

No. 02-693 Status: ARGUED
Title: John M. Lamie, Petitioner
v.
United States Trustee
Docketed: November 7, 2002
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (01-1779, 01-1780)
Decision Date: May 31, 2002
Rehearing Denied: August 5, 2002

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 4 2002	Petition for writ of certiorari filed. (Response due December 9, 2002)
Dec 5 2002	Order extending time to file response to petition to and including January 8, 2003.
Dec 27 2002	Order further extending time to file response to petition to and including February 7, 2003.
Feb 5 2003	Brief of respondent United States Trustee in opposition filed.
Feb 7 2003	Brief amicus curiae of G. Eric Brunstad, Jr. filed.
Feb 7 2003	Brief amicus curiae of National Association of Consumer Bankruptcy filed.
Mar 10 2003	Petition GRANTED.
Apr 10 2003	Extension of time to file the joint appendix and petitioner's brief on the merits to and including May 23, 2003.
May 8 2003	Further extension of time to file the joint appendix and petitioner's brief on the merits to and including May 30, 2003.
May 30 2003	Brief of petitioner John M. Lamie filed.
May 30 2003	Motion to dispense with printed appendix filed by petitioner John M. Lamie.
Jun 18 2003	Extension of time within which to file respondent's brief on the merits to and including August 6, 2003.
Jun 27 2003	Motion of petitioner to dispense with printing the joint appendix GRANTED.
Aug 6 2003	Brief of respondent United States Trustee filed.
Aug 19 2003	CIRCULATED.
Aug 19 2003	SET FOR ARGUMENT Monday November 10, 2003.
Sep 4 2003	Record received from the U.S.C.A. for the 4th Circuit. (1 box)
Sep 4 2003	Record received from the U.S.D.C. for the Western Dist. of Virginia. (1 envelope)
Sep 10 2003	Reply of petitioner John M. Lamie filed.
Nov 10 2003	Argued. For Petitioner: Thomas C. Goldstein. For Respondent: Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, DC.

Supreme Court, U.S.
FILED

02 693 NOV - 4 2002

OFFICE OF THE CLERK

No. 02-___

IN THE

Supreme Court of the United States

John M. Lamie,

Petitioner,

v.

United States Trustee.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

John M. Lamie
BROWNING, LAMIE & GIFFORD, P.C.
P.O. Box 519
Abington, VA 24212

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

November 4, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Does 11 U.S.C. § 330(a)(1) authorize a court to award fees to a debtor's attorney?

PARTIES TO THE PROCEEDINGS BELOW

In the court of appeals, this matter was captioned *In re Equipment Services (United States Trustee* v. *Equipment Services).* Equipment Services is a debtor represented by John M. Lamie. Because the issue in this Court is Lamie's right to attorney's fees, and because the United States Trustee objected to the fee award in the proceedings below, they are denominated the petitioner and respondent in this Court. Equipment Services remains a nominal party.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW AND JURISDICTION 1
RELEVANT STATUTORY PROVISION 1
STATEMENT 3
REASONS FOR GRANTING THE WRIT 8
CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Dewsnup v. *Timm*, 502 U.S. 410 (1992) 15
Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995) 13
In re Am. Steel Prod., Inc., 197 F.3d 1354 (CA11 1999) 9
In re Ames Dep't Stores, 76 F.3d 66 (CA2 1996) 9
In re Bottone, 226 B.R. 290 (Bankr. D. Mass. 1998) 10
In re Brierwood Manor, Inc., 239 B.R. 709 (Bankr. D.N.J. 1999) 10
In re Century Cleaning Servs., Inc., 195 F.3d 1053 (CA9 1999) 8, 9, 12, 16
In re Eggleston Works Loudspeaker Co., 253 B.R. 519 (BAP CA6 2000) 10
In re Fassinger, 191 B.R. 864 (Bankr. D. Or. 1996) 10
In re Friedland, 182 B.R. 576 (Bankr. D. Colo. 1995) 10
In re Hodes, 235 B.R. 93 (Bankr. D. Kan. 1999) 10
In re Johnson, 234 B.R. 671 (Bankr. S.D. Tex. 1999) 10
In re Kinnemore, 181 B.R. 520 (Bankr. D. Idaho 1995) 10
In re Miller, 211 B.R. 399 (Bankr. D. Kan. 1997) 10
In re Pontiac Hotel Assocs., 92 B.R. 715 (E.D. Mich. 1988) 15
In re Pro-Snax Distrib., Inc., 157 F.3d 414 (CA5 1998) 9
In re Ramey, 266 B.R. 857 (Bankr. S.D. Iowa 2001) 9
In re Redding, 242 B.R. 468 (Bankr. W.D. Mo. 1999) 9
In re Skinner, 240 B.R. 225 (Bankr. W.D. Va. 1999) 10
In re Smith, 305 F.3d 1078 (CA9 2002) 8
In re Stroudsburg Dyeing & Finishing Co., 209 B.R. 648 (Bankr. M.D. Pa. 1997) 10
In re Taylor, 250 B.R. 869 (E.D. Va. 2000) 10, 13
In re Thomas, 195 B.R. 18 (Bankr. W.D.N.Y. 1996) 9, 16
In re Top Grade Sausage, Inc., 227 F.3d 123 (CA3 2000) 8, 9, 12

In re UNR Indus., Inc., 986 F.2d 207 (CA7 1993) 15
Local Loan Co. v. *Hunt*, 292 U.S. 234 (1934) 3

Statutes

11 U.S.C. § 1107(a) 5
11 U.S.C. § 329 ..... 3, 13
11 U.S.C. § 330 ..... passim
11 U.S.C. § 330(a)(1) ..... passim
11 U.S.C. § 330(a)(1)(A) 4, 7, 12, 13
11 U.S.C. § 330(a)(4)(A)(ii)(I) 14
11 U.S.C. § 330(a)(4)(B) 14
11 U.S.C. § 330(a)(5) 13, 14
11 U.S.C. § 331 ..... 3, 13
11 U.S.C. § 503 3
28 U.S.C. § 1254(1) 1

Other Authorities

140 Cong. Rec. S4741 (daily ed. Apr. 21, 1994) (statement of Senator Heflin for Senator Metzenbaum) 11
2001 Year-End Totals for Filings Reach New High, THE BANKRUPTCY STRATEGIST, Apr. 2002 16
Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 1999 ABI JNL. LEXIS 79 (June 1999) 17
H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977) 15
Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 BANK. DEV. J. 201 (2001) 16
Model Rules of Professional Conduct Rule 1.16(b) 17
S. 540, 103d Cong. § 309 (1994) 11

Treatises

Collier on Bankruptcy ¶ 330.LH (15th ed. 2001) 4, 10, 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner John Michael Lamie respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 290 F.3d 739. The opinions of the district court (Pet. App. 15a-27a) and bankruptcy court (*id.* 28a-44a) are unpublished. The court of appeals issued its opinion on May 31, 2002, and denied rehearing *en banc* on August 5, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

11 U.S.C. 330(a) provides:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title [11 USCS §§ 101 et seq.];

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title [11 USCS §§ 101 et seq.].

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for--

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

STATEMENT

For more than a century, Congress has authorized the use of funds from the bankruptcy estate to pay the debtor's attorney. The Fourth Circuit in this case nonetheless held that such compensation is forbidden under Section 330(a) of the Bankruptcy Code. In reaching that conclusion, the court of appeals expressed its regret that its decision "widens the split on this issue with three other circuits." Pet. App. 2a. The question presented has great significance for the more than *one million* Chapter 7 bankruptcy filings in this country each year, as well as for the administration of the bankruptcy laws generally.

1. A business or individual who files for bankruptcy must, of course, pay its ongoing expenses during the course of the bankruptcy proceedings. Yet the bankrupt lacks funds to pay those expenses because it must "surrender[] for distribution the property which [it] owns *at the time of bankruptcy*." *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934) (emphasis in original). To solve this problem, Congress enacted a statutory scheme enabling debtors to pay their administrative costs during the course of the bankruptcy proceedings. See generally 11 U.S.C. 503.

Among these administrative costs are legal fees for representing the debtor during bankruptcy. The Bankruptcy Code sets out an orderly scheme for the payment of debtors' attorneys. First, it permits a debtor to pay a retainer to an attorney in advance of the work done. 11 U.S.C. 329. Second, it authorizes the award of interim compensation to a debtor's attorney during the course of the bankruptcy. *Id.* § 331. Third, it provides for full payment to various persons at the conclusion of the proceedings. *Id.* § 330. Fourth, it deems such payment to be a legitimate administrative expense with priority over other claims to the estate. *Id.* § 503(b).

This case involves the final payment of legal fees under 11 U.S.C. 330(a), which Congress enacted as part of the comprehensive Bankruptcy Code in 1978. The purpose of

Section 330 was to update and strengthen existing provisions for compensation that had been a part of U.S. bankruptcy law since 1898. See Collier on Bankruptcy ¶ 330.LH (15th ed. 2001). The compensation provisions of the predecessor Bankruptcy Act had been designed to minimize compensation to debtors' attorneys so as to keep the bankruptcy estate as large as possible. Section 330, by contrast, seeks to provide that "[a]ttorneys and other professionals serving in a bankruptcy case are * * * compensated at the same rate that would be used to compensate them for performing comparable services in nonbankruptcy cases." *Id.* ¶ 330.LH[4]. In the absence of a statute embodying this principle, "professionals capable of earning more substantial compensation in other fields might leave the bankruptcy arena." *Id.*

As currently enacted, Section 330 states: "[T]he court may award to a trustee, an examiner, [*sic*] a professional person employed [by the trustee] * * * reasonable compensation for * * * services rendered by the trustee, examiner, professional person, or attorney." 11 U.S.C. 330(a)(1)(A). Prior to 1994, the list of persons to whom "the court may award" compensation under this provision concluded with "or the debtor's attorney."[1] The question presented by this case is whether Congress's omission of that phrase in the 1994 recodification of Section 330 was

---

[1] Prior to 1994, Section 330(a) provided:

> After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney * * *.

(emphasis added).

purposeful and intended to deprive attorneys of compensation, or instead was an error in drafting.

2. Equipment Services hired petitioner John M. Lamie, an attorney, to represent the company in its bankruptcy proceedings. The company paid Lamie $1,000 for preparing the petition for Chapter 11 reorganization. It furthermore paid Lamie an additional $5,000 retainer for subsequent work, which he deposited into a client escrow account. That account served as a fund from which Lamie ultimately would seek to draw compensation for his work in the bankruptcy proceedings.

Lamie filed the petition for relief in December 1998, and the bankruptcy court appointed him counsel for the debtor. He then represented Equipment Services in its Chapter 11 proceeding while earning $1,325 in fees that he would later request to be paid from the escrow account.

In March 1999, respondent U.S. Trustee successfully moved to convert the case into a Chapter 7 liquidation proceeding. Lamie earned another $1,000 during the Chapter 7 phase.

3. In June 2000, Lamie filed with the bankruptcy court a request under Section 330(a) to approve the $2,325 in fees he had earned. The U.S. Trustee did not oppose an award of $1,325 for Lamie's work at the Chapter 11 stage. During that time, Equipment Services (as the debtor in possession) had the rights of a "trustee." See 11 U.S.C. 1107(a). The U.S. Trustee took the view that Section 330(a)(1) authorizes the payment of fees in that circumstance because the debtor's attorney is acting as "a professional person employed [by the trustee]."

However, the U.S. Trustee opposed the award of $1,000 for Lamie's work during the Chapter 7 stage. At that point, a trustee had been appointed, so the company was no longer the debtor in possession and it therefore lacked the rights of a "trustee." The U.S. Trustee contended that Section 330(a)(1) precludes the award of fees to a debtor's attorney because the

statute does not authorize the bankruptcy court to award compensation to a "debtor's attorney."

The bankruptcy court agreed with the U.S. Trustee's interpretation of Section 330(a)(1). See Pet. App. 32a-38a. But the court nonetheless awarded Lamie the full $2,325, including $1,000 for work during the Chapter 7 proceedings. It reasoned that the portion of the $5,000 retainer used to pay Lamie for his work should be treated as funds outside the bankruptcy estate. *Id.* 38a-43a. The U.S. Trustee appealed to the district court, which affirmed. *Id.* 15a-27a.

Although the bankruptcy court and district court concluded that Section 330(a)(1) precludes compensating debtors' attorneys from the bankruptcy estate, both noted the considerable problems associated with that interpretation. The bankruptcy court acknowledged that its interpretation renders Section 330(a)(1) "arguably internally inconsistent with § 330(a)(1)(A)," and that "the absence of legislative history and a brief review of the syntax of the statute might indicate that" the absence of "attorneys" in the initial list "was inadvertent." Pet. App. 35a-36a. The district court similarly found it "[e]asy to believe that" the omission was "inadvertent[]"; and it went on to explain: "There are doubtless strong policy reasons for *not* omitting a chapter 7 debtor's attorney from eligibility for fees paid from the debtor's estate." *Id.* 23a-24a (emphasis in original).

4. On the U.S. Trustee's appeal, a divided panel of the Fourth Circuit agreed that Section 330(a)(1) precludes compensating debtors' attorneys in cases in which a trustee has been appointed (including *all* Chapter 7 cases), but it concluded that the retainer paid to Lamie was part of the bankruptcy estate. It therefore disallowed payment to Lamie of the $1,000 he earned during the Chapter 7 proceedings.

The Fourth Circuit held that "the plain language of the 1994 version of § 330(a)" is "unambiguous and reasonable in application": "The 1994 version clearly omits the prior authorization to compensate the debtor's attorney from a

Chapter 7 estate." Pet. App. 8a-9a. The court thus agreed with rulings of the Fifth and Eleventh Circuits, but acknowledged that it decision conflicted squarely with rulings of the Third and Ninth Circuits. *Id.* 2a, 6a-7a.

The panel majority rejected petitioner's showing that the omission of "the debtor's attorney" from the list of persons to whom compensation may be paid was an inadvertent mistake of the drafting process, as evidenced by the fact that the revised statute omitted not merely "the debtor's attorney" but also the conjunction "or," leaving Section 330 grammatically incorrect. Pet. App. 8a-9a. The panel majority also rejected petitioner's arguments that reading the statute as respondent proposed would undo Congress's orderly scheme for compensating debtors' attorneys, rendering several of its provisions superfluous and nonsensical. For example, although Section 330(a) does not explicitly include a debtor's attorney among the persons who may be compensated, it *does* expressly provide for "reasonable compensation for * * * services rendered by *the* * * * *attorney*." The panel majority reasoned that "the reference to 'attorney' in [the latter half of] § 330(a)(1)(A) does not make the statute ambiguous" because "the antecedent to 'attorney' as used in § 330(a)(1)(A)" could be the words "a professional person employed [by the trustee]" in the first part of the sentence. Pet. App. 8a.

The Fourth Circuit separately reversed the lower courts' determination that the retainer received by Lamie was not part of the bankruptcy estate. The court of appeals reasoned that the retainer was placed in escrow only to protect Lamie against nonpayment. Pet. App. 9a-12a. Lamie had agreed to draw money from the retainer in proportion to the amount of work he did, and to return any unused money to Equipment Services at the end of the proceedings. The entire retainer,

therefore, belonged to the company according to principles of Virginia contract law. *Id.*[2]

Judge Michael agreed with the panel majority that the retainer was part of the bankruptcy estate but dissented from its interpretation of Section 330(a)(1). See Pet. App. 13a-14a. He would have adopted the conclusion of the Third and Ninth Circuits that "when Congress amended § 330(a) in 1994, it inadvertently deleted debtors' attorneys from the existing statutory list of those who could be paid from the bankruptcy estate for services rendered in bankruptcy proceedings." *Id.* 13a. Because the bankruptcy court had not applied the guidelines for awarding fees set out in Section 330, Judge Michael would have "vacate[d] the award of attorney's fees to Lamie for his post-Chapter 7 services and * * * remand[ed] for the bankruptcy court to evaluate Lamie's fee application under the proper standard." *Id.* 14a.

5. The Fourth Circuit denied rehearing and rehearing *en banc*, and this petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The question presented is the subject of an irreconcilable three-to-two circuit conflict openly acknowledged by the courts of appeals. The Third and Ninth Circuits have held that Section 330 does not deprive debtors' attorneys of their right to compensation, *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 127-30 (CA3 2000); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1057-61 (CA9 1999), a conclusion the Ninth Circuit recently reaffirmed, *In re Smith*, 305 F.3d 1078, 2002 U.S. App. LEXIS 20091, at *13 (CA9) ("This panel, of course, may not overrule a prior panel of this court, and if we could, Smith offers no persuasive reason why we should."). The Second Circuit has also stated its agreement in dictum. *In re Ames Dep't Stores*,

[2] Petitioner does not challenge that determination in this Court.

76 F.3d 66, 71-72 (CA2 1996). The Fourth Circuit, by contrast, joined the Fifth and Eleventh Circuits in reaching the opposite conclusion. *In re Am. Steel Prod., Inc.*, 197 F.3d 1354, 1355-56 (CA11 1999); *In re Pro-Snax Distrib., Inc.*, 157 F.3d 414, 424-26 (CA5 1998).

Only this Court can resolve the conflict. The circuits have openly acknowledged the split but refused to follow other courts with which they disagree. After the Fifth Circuit ruled against the debtor's attorney in *Pro-Snax*, the Ninth Circuit avowedly rejected that conclusion, labeling the decision of the Fifth Circuit an "error." *Century Cleaning Servs.*, 195 F.3d at 1058. The Eleventh Circuit next addressed the question and, acknowledging that "[b]oth the Fifth and the Ninth Circuits have considered this identical issue and have reached contrary results," it sided with the Fifth Circuit. *Am. Steel Prod., Inc.*, 197 F.3d at 1356. The Third Circuit then entered the fray, noted the split, *Top Grade Sausage, Inc.*, 227 F.3d at 128, and cast its lot with the Ninth Circuit, *id.* at 130. Finally, the Fourth Circuit agreed with the Fifth and Eleventh Circuits, despite taking note of the growing problem: "Regretfully, this decision also widens the split on this issue with three other circuits." Pet. App. 2a (rejecting holdings of the Third and Eleventh Circuits and dictum of the Second).

The conflict is furthermore intractable because petitioner urged the Fourth Circuit to reconsider its decision *en banc*, but the court of appeals refused. See Pet. App. 45a.

The circuit split brings the overall conflict in the federal courts to an extraordinary *twelve-to-ten*, because there is a nine-to-eight split among other federal courts. The decision below is consistent with the holdings of courts located within the jurisdiction of three circuits – the Second, Eighth, and Tenth – which have not decided the issue. *In re Ramey*, 266 B.R. 857 (Bankr. S.D. Iowa 2001); *In re Redding*, 242 B.R. 468 (Bankr. W.D. Mo. 1999); *In re Thomas*, 195 B.R. 18 (Bankr. W.D.N.Y. 1996); *In re Friedland*, 182 B.R. 576, 578-

79 (Bankr. D. Colo. 1995); *In re Kinnemore*, 181 B.R. 520, 521 (Bankr. D. Idaho 1995); see also *In re Skinner*, 240 B.R. 225 (Bankr. W.D. Va. 1999); *In re Johnson*, 234 B.R. 671 (Bankr. S.D. Tex. 1999); *In re Keller Fin. Servs., Inc.*, 243 B.R. 806, 817 (Bankr. M.D. Fla. 1999); *In re Fassinger*, 191 B.R. 864, 865 (Bankr. D. Or. 1996). But the decision below conflicts with decisions of courts located within the jurisdiction of four circuits – the First, Sixth, Eighth, and Tenth – that have not decided the issue. *In re Eggleston Works Loudspeaker Co.*, 253 B.R. 519, 524 (BAP CA6 2000); *In re Hodes*, 235 B.R. 93, 98 (Bankr. D. Kan. 1999); *In re Bottone*, 226 B.R. 290, 297 (Bankr. D. Mass. 1998); *In re Miller*, 211 B.R. 399, 400-02 (Bankr. D. Kan. 1997); *In re Melp Ltd.*, 179 B.R. 636, 639 (E.D. Mo. 1995); see also *In re Taylor*, 250 B.R. 869, 870-71 (E.D. Va. 2000); *In re Brierwood Manor, Inc.*, 239 B.R. 709 (Bankr. D.N.J. 1999); *In re Stroudsburg Dyeing & Finishing Co.*, 209 B.R. 648, 650 (Bankr. M.D. Pa. 1997).

3. Certiorari is also warranted because the Fourth Circuit's construction of Section 330(a) is wrong. Congress did not intend to enact such an abrupt departure from longstanding bankruptcy practice that would bring incoherence and inequity to the Bankruptcy Code. The leading treatise on bankruptcy law thus urges courts to acknowledge that the omission in Section 330(a)(1) is a drafting error and to treat it as such:

> [S]ection 330(a)(1) of the Code deletes the reference to "the debtor's attorney" as a party who may be allowed compensation. Clearly this result was unintended * * *. [It] would represent a fundamental change in the law. * * * Because the change is inconsistent with current case law and the legislative history of section 330 does not support such a drastic change, courts should construe the deletion as unintended.

Collier, *supra*, ¶ 330.LH[5].

The Fourth Circuit rested its contrary decision on the fact that the 1994 revision to Section 330(a) omits "the debtor's attorney" from the list of persons to whom the court may award "reasonable compensation." The court of appeals erred, however, in rejecting the Third and Ninth Circuits' view that the omission was an inadvertent scrivener's error.

a. The original proposal to amend Section 330(a) in the Bankruptcy Reform Act of 1994 retained the words "or the debtor's attorney." It simply added a provision permitting the U.S. Trustee to object to the size of any fee award under the statute – and, importantly, that new provision was inserted *immediately after* the words "or the debtor's attorney."[3] What happened next is crucial. Senator Metzenbaum introduced a further amendment that deleted the provision for review by the U.S. Trustee immediately following the phrase "or the debtor's attorney" and transferred the review provision to a later subsection of Section 330. See 140 Cong. Rec. S4741 (daily ed. Apr. 21, 1994) (statement of Senator Heflin for Senator Metzenbaum).

To implement this "amendment to the amendment," it was necessary to delete the last twenty-nine words of Section

---

[3] The proposal thus stated (with the proposed amendment italicized):

> (1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, or the debtor's attorney, *after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28* —
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney * * *.

S. 540, 103d Cong. § 309 (1994) (emphasis added).

330(a)(1) – from "after considering" through "pursuant to section 586(a)(3)(A) of title 28." However, when the amended Section 330 appeared, the last *thirty-three* words had been deleted: Instead of starting at the end of Section 330(a)(1) and crossing out twenty-nine words, the drafter inadvertently crossed out thirty-three words, thereby deleting the phrase "or the debtor's attorney." These four extra words have nothing to do with the other deleted text or with the purpose for which the other twenty-nine words were deleted. See *Century Cleaning Servs.*, 195 F.3d at 1059 ("Coincidentally, the language providing for objections, which Senator Metzenbaum's amendment removed from § 330(a)(1) in the reorganization, was contained in a clause that happened to fall immediately after the term 'debtor's attorney,' although the two subject matters were entirely unrelated.").

b. That Congress did not intend to eliminate the settled right of debtors' attorneys to be compensated for their services is furthermore clear from the fact that the Fourth Circuit's interpretation of Section 330(a) wreaks havoc on the orderly scheme for compensating debtors' attorneys in Sections 329, 330, and 331.

First, the decision below renders meaningless Section 330(a)'s provision for compensation for "services rendered by the * * * attorney." Even the Fourth Circuit felt compelled to concede that, on its construction, "the reference in § 330(a)(1)(A) to 'attorney' may be superfluous." Pet. App. 9a. Section 330(a) is structured as a series of parallel references: "a trustee" may receive compensation for services by "the trustee"; "an examiner" may receive compensation for services by "the * * * examiner"; and "a professional person employed [by the trustee]" may be compensated for services by "the * * * professional person." Section 330(a) also permits compensation for services by "the * * * attorney," but the Fourth Circuit's decision that "the * * * attorney" may not receive compensation deprives those words of any meaning. See *Top Grade Sausage*, 227 F.3d at 129 ("The use of 'the' in

§ 330(a)(1)(A) * * * refers to the universe of officers listed in § 330(a)(1), thereby leaving the word 'attorney' in § 330(a)(1)(A) without prior reference.").

The Fourth Circuit nonetheless contended that Section 330(a)'s authorization for payment to a "professional person employed [by the trustee]" "could be the antecedent to 'attorney' as used in § 330(a)(1)(A)." Pet. App. 8a. But that reading contravenes the principle that this "Court will avoid a reading which renders some words altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995). Section 330 already provides that such a "professional person" will be compensated for the services of "the * * * professional person," such that the Fourth Circuit's reading renders the phrase "the * * * attorney" wholly duplicative.

Second, the Fourth's Circuit's decision renders meaningless Section 329 of the Bankruptcy Code, which "permits the debtor's attorney to receive a reasonable retainer for services rendered in contemplation of, or to be rendered in connection with, a case under the Bankruptcy Code." Collier, *supra*, ¶ 330.LH[4]. The statute requires that attorneys' retainers be detailed in a submission to the bankruptcy court, which "may cancel any such agreement, or order the return of such payment, to the extent excessive." 11 U.S.C. 329. "Section 329 * * * would be superfluous if the deletion in section 330(a) is construed as excepting debtors' counsel from compensation under section 330." Collier, *supra*, ¶ 330.LH[5].

Third, the Fourth Circuit's decision brings Section 330(a)(1) into conflict with Sections 331 and 330(a)(5). Section 331 permits not only a "professional person employed [by a trustee]" but also "a debtor's attorney" to receive interim compensation while bankruptcy proceedings are ongoing. 11 U.S.C. 331. "Obviously, if a debtor's attorney is eligible to apply for interim payments, she must be eligible for payments in the first place." *In re Taylor*, 250 B.R. at 871. And, indeed, Section 330(a)(5) specifically

contemplates that the interim compensation to a debtor's attorney will be considered in measuring the fees to be paid under Section 330(a)(1): "The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331." 11 U.S.C. 330(a)(5).

Finally, the Fourth Circuit's decision renders nonsensical Section 330(a)(4)(B), which governs the compensation of debtors' attorneys in cases under Chapters 12 and 13. The pivotal provision of Section 330 is subsection (a)(1), which lists the types of persons expressly authorized to be compensated for their work on the bankruptcy proceedings. Section 330(a)(4), in turn, designates the circumstances in which courts may award compensation. Among other things, it prohibits compensation for services that are not "reasonably likely to benefit the debtor's estate." 11 U.S.C. 330(a)(4)(A)(ii)(I). Subsection (a)(4) includes an exception to that rule, however: in personal bankruptcies under Chapters 12 and 13, "the court may allow reasonable compensation to *the debtor's attorney* for representing the interests of the *debtor*." *Id.* § 330(a)(4)(B) (emphasis added).

The obvious premise of this exception is that debtors' attorneys may receive compensation under subsection (a)(1). If that were not so, it would be inconsistent to include a special provision permitting their compensation in Chapter 12 and 13 bankruptcies, for the only classes of persons eligible for compensation in bankruptcy proceedings would be trustees, examiners, and professionals employed by trustees.

4. The Fourth Circuit's decision is furthermore untenable because it is implausible to believe that Congress intended to enact such a dramatic departure from settled practice – eliminating even the less generous compensation that was available under the Bankruptcy Act by 1898 – particularly a departure with such negative consequences for the bankruptcy system. By authorizing fee awards, Congress in Section 330 aimed to ensure "that attorneys [would] be reasonably

compensated and that future attorneys [would] not be deterred from taking bankruptcy cases due to a failure to pay adequate compensation. * * * The important thing is to provide compensation in bankruptcy equivalent to that outside it." *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (CA7 1993); see also *In re Pontiac Hotel Assocs.*, 92 B.R. 715, 716 (E.D. Mich. 1988) ("Bankruptcy judges may award compensation to a debtor's attorney pursuant to 11 U.S.C. § 330. This statute was designed to ensure that bankruptcy counsel would command fees comparable to non-bankruptcy counsel, and thus that competent professionals would be attracted to the bankruptcy field." (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 329-30 (1977))). For Congress to reverse that purpose 180 degrees, without any discussion of the change, would be bizarre; and an interpretation to that effect is disfavored by this Court. See *Dewsnup* v. *Timm*, 502 U.S. 410, 419-20 (1992) ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate.' * * * This Court has been reluctant to accept arguments that would interpret the Code * * * to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history.").

Such a reversal of the purpose for Section 330 would surely have garnered Congress's attention because of its extremely harmful consequences. If lawyers cannot be paid for representing debtors in bankruptcy proceedings, then the debtors will go unrepresented, adversely affecting the orderly administration of the bankruptcy laws:

> There are several postpetition services commonly performed by the debtor's attorney in chapter 7 proceedings that are necessary to the administration of the estate. If debtors' attorneys' compensation is not permitted, this may have the effect of denial of counsel, or at the very least, lead to debtors representing themselves. This possibility may lead to increased errors and time spent to correct those

errors, thereby further extending the time necessary to adjudicate all parts of the case.

Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 BANK. DEV. J. 201, 219-20 (2001).

Even a judge who felt compelled by the text of Section 330(a)(1) to deny attorneys' fees lamented the deeply unfair results of that interpretation: "Categorical exclusion of fees can only result in denial of access to justice, with debtors unrepresented or under-represented. The increase in *pro se* cases, and in cases which become *pro se* after the petition is filed, does not aid the administration of our bankruptcy system." *Century Cleaning Servs.*, 195 F.3d at 1064 (Thomas, J., dissenting); *see also id.* at 1060 ("Policy considerations * * * counsel in favor of allowing attorneys to receive reimbursement under § 330. There are several post-petition services commonly performed by the debtor's attorney in Chapter 7 proceedings that are necessary to the administration of the estate."). Depriving debtors of representation deals a devastating blow to companies and individuals who have gone bankrupt.

Not only are the consequences negative, but also they are sweeping. The question presented in this case is vitally important to the administration of the bankruptcy laws. It potentially affects every Chapter 7 bankruptcy and every Chapter 11 bankruptcy in which a trustee has been appointed. In 2001, there were 1,054,975 Chapter 7 filings alone, more than twice the number for all other forms of bankruptcy combined. *2001 Year-End Totals for Filings Reach New High*, THE BANKRUPTCY STRATEGIST, Apr. 2002, at 1.

Moreover, the question presented implicates many Chapter 11 bankruptcies in which no trustee has been appointed because, as in this case, such proceedings are often converted into Chapter 7 cases. If attorneys know that they cannot be compensated for work done under Chapter 7, then they will be loath to take on a Chapter 11 case. The

construction of Section 330(a)(1) adopted below thus increases the risk that the attorney will be left "working for free," in part because "state law ethical obligations may require an attorney to continue to perform as counsel, regardless of the potential prohibition of payment." Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 1999 ABI JNL. LEXIS 79, at *7-*8 (June 1999). Fearing that the canons of ethics would prevent them from abandoning their client once the case was converted to Chapter 7, attorneys will stay away from the outset. *Cf.* Model Rules of Professional Conduct Rule 1.16(b) (permitting attorneys to withdraw from representing a client only "if withdrawal can be accomplished without material adverse effect on the interests of the client" or if other unusual circumstances exist).

The importance of the issue is highlighted by the fact that it has been decided squarely by five courts of appeals and *seventeen* other federal courts since 1995. Without guidance from this Court, a rapidly deepening divide is virtually assured. Bankruptcies occur in every jurisdiction, debtors need representation in those proceedings, and no consensus on this issue is in sight.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John Michael Lamie
BROWNING, LAMIE & GIFFORD, P.C.
P.O. Box 519
Abington, VA 24212

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

November 4, 2002

APPENDIX

In re EQUIPMENT SERVICES, INCORPORATED, Debtor.
United States Trustee, Plaintiff-Appellant,
v.
EQUIPMENT SERVICES, INCORPORATED,
Defendant-Appellee.

Nos. 01-1779, 01-1780

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Argued April 2, 2002.
Decided May 31, 2002.

Appeals from the United States District Court
For the Western District of Virginia, at Abingdon.
James P. Jones, District Judge.
(CA-00-143, BK-98-4851)

COUNSEL

ARGUED: P. Matthew Sutko, Office of the General Counsel, Executive Office for United States Trustees, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant, John Michael Lamie, BROWNING, LAMIE & GIFFORD P.C., Abingdon, Virginia, for Appellee. ON BRIEF: Joseph A. Guzinski, Acting General Counsel, Office of the General Counsel, Executive Office for United States Trustees, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.: Margaret K. Garber, Trial Attorney, Office of the United States Trustee, UNITED STATES DEPARTMENT OF JUSTICE, Roanoke, Virginia: David R. Duncan, Regional Assistant United States Trustee, Office of the United States Trustee, UNITED STATES DEPARTMENT OF JUSTICE, Columbia, South Carolina, for Appellant.

Before NIEMEYER, WILLIAMS, and MICHAEL, Circuit Judges.

OPINION

NIEMEYER, Circuit Judge:

John M. Lamie, an attorney retained to represent Equipment Services, Inc. in bankruptcy, applied to the bankruptcy court for the payment of his legal fees incurred (1) pre-petition, (2) during the Chapter 11 proceeding, and (3) after conversion to a Chapter 7 proceeding. Applying the current version of the Bankruptcy Code (as amended in 1994), 11 U.S.C. § 330(a) (2000), we affirm the district court's approval of fees incurred before the conversion to Chapter 7 and reverse its approval for fees incurred after. In reaching this conclusion, we reject Lamie's argument that § 330(a) included a "scrivener's error" when it was amended in 1994 to delete the "debtor's attorney" from the list of persons eligible to be paid from bankruptcy estate, and we join two circuits that have reached the same conclusion. Regretfully, this decision also widens the split on this issue with three other circuits.

I

Equipment Services, Inc. retained John Lamie to prepare for the company a voluntary petition for relief under Chapter 11 of the Bankruptcy Code and to represent the company in the bankruptcy proceedings. Equipment Services paid Lamie a $6,000 "retainer," of which $1,000 was used to pay the fees and costs of filing the Chapter 11 petition. Consistent with the arrangement reached with Equipment Services, Lamie deposited the remaining $5,000 in his client escrow account, to be drawn upon as Lamie earned fees. This retainer arrangement was not documented, but Lamie explained it to the bankruptcy court as follows:

The Court: What was your understanding, as far as the retainer was concerned?

Mr. Lamie: Well, the retainer was to pay me in advance for fees that I would earn during the case, Your Honor. And it was to assure some payment of those fees. That is the reason. That is the way we explained to the client.

The Court: Was it your understanding that any unused fees at the end of the case would be, in effect, refunded back to the Debtor?

Mr. Lamie: Oh, it would be the Debtor's property at the end of the case, yes, Your Honor.

The Court: So, the effect it [sic] to protect you . . . you know, your ability to get paid, is that what you were doing?

Mr. Lamie: Yes. Yes, the money was put into trust and is billed against it. That is the way we have handled it.

Lamie filed the Chapter 11 petition on December 24, 1998, and, pursuant to Federal Rule of Bankruptcy Procedure 2016(b), he informed the bankruptcy court that he had received the remaining $5,000 from Equipment Services. He also obtained the bankruptcy court's permission to represent Equipment Services as the debtor-in-possession. Thereafter, during the Chapter 11 proceeding and before it was converted into a Chapter 7 proceeding, Lamie earned $1,325 in fees and incurred $3.85 in costs.

On March 17, 1999, on the motion of the United States Trustee, Equipment Services' Chapter 11 proceeding was converted into a Chapter 7 proceeding, and Robert E. Wick, Jr., was appointed to administer the bankruptcy estate. Lamie earned another $1,000 representing Equipment Services during the Chapter 7 proceeding. On June 5, 2000, Lamie filed an application with the bankruptcy court, seeking

approval of attorneys fees in the amount of $2,325 ($1,325 earned during the Chapter 11 proceeding and $1,000 earned during the Chapter 7 proceeding) and $3.85 in costs incurred during the Chapter 11 proceeding. The United States Trustee objected to the award of fees to the extent that they included compensation for services rendered after the case was converted to a Chapter 7 proceeding. The Trustee argued that 11 U.S.C. § 330(a) "makes no provision for counsel of the debtor to be compensated by the estate" in a Chapter 7 proceeding. Moreover, the Trustee asserted that the application for fees did not specify what benefit the estate, as distinct from Equipment Services, received as the result of Lamie's work.

The bankruptcy court agreed with the Trustee that, under 11 U.S.C. § 330(a), a debtor's attorney is not authorized to be paid funds from the bankruptcy estate for services rendered after the case is converted to a Chapter 7 proceeding. The court nonetheless awarded Lamie all of his requested fees, in the amount of $2,325, plus $3.85 in costs, concluding that the prepetition retainer held by Lamie was property of the bankruptcy estate only to the extent that it exceeded the *total fees* allowed to the debtor's counsel for *all services* rendered in the case, including services rendered after the Chapter 7 conversion.

The United States Trustee appealed this ruling to the district court, and Lamie cross-appealed the bankruptcy court's ruling that 11 U.S.C. § 330(a) prohibits a debtor's attorney from obtaining compensation from a Chapter 7 estate. The district court affirmed the bankruptcy court on both issues, and the parties filed these cross-appeals, raising two issues: (1) whether 11 U.S.C. § 330(a) (2000) allows a Chapter 7 debtor's attorney to be compensated from the estate; and (2) whether Lamie was entitled to deduct his post-Chapter 7 fees from the retainer notwithstanding any lack of authorization from § 330(a) to pay the debtor's attorney from the bankruptcy estate.

II

We first resolve whether 11 U.S.C. § 330(a) (2000) allows a Chapter 7 debtor's attorney to be compensated from the bankruptcy estate, an issue on which the courts of appeals have split. Both the bankruptcy court and the district court concluded that the plain language of § 330(a) does not authorize a debtor's attorney to be compensated from the estate in a Chapter 7 proceeding. Lamie contends that these courts' conclusions fail to recognize that when the Bankruptcy Code was amended in 1994, Congress made a scrivener's error in omitting authorization to pay fees to the debtor's attorney from a Chapter 7 estate--an authorization that existed prior to the 1994 revisions.

The 1986 version of § 330(a) stated in relevant part:

> (a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
>
> > (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title.

11 U.S.C. § 330(a) (1988) (emphasis added). The Bankruptcy Reform Act of 1994 amended § 330(a) to read in relevant part as follows:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an

examiner, a professional person employed under section 327 or 1103

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person.

11 U.S.C. § 330(a) (2000). Thus, § 330(a), as revised in 1994, omits the phrase "or the debtor's attorney" from the list of persons to whom a court may award "reasonable compensation" from the bankruptcy estate for services rendered in a Chapter 7 proceeding.

Lamie argues that the deletion of the reference to debtor's attorneys was inadvertent and that the omission renders the statute ambiguous, permitting courts to look to the legislative history in interpreting the statute. He maintains that the ambiguity arises from the fact that the 1994 version, while omitting "debtor's attorney" from its enumeration of persons whom bankruptcy courts can compensate from the estate, nonetheless retains a reference to attorneys in subpart (A). *See* 11 U.S.C. § 330(a)(1)(A) (2000) (allowing "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney ..."). Lamie also argues that a grammatical error supports his conclusion that the 1994 version of § 330(a) is ambiguous. He notes that there is no conjunction "or" between "examiner" and "a professional person" in the list of persons authorized to receive fees in § 330(a), supporting the conclusion that the deletion of "or the debtor's attorney" was inadvertent. Based on this ambiguity, he maintains that the court should look to the legislative history and conclude that Congress expressed no intent to omit debtor's attorneys from § 330(a) when it enacted the Bankruptcy Reform Act of 1994. Lamie's argument is supported by decisions in three circuits. *See In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130 (3d Cir. 2000) (holding that Chapter 7 debtor's attorneys may be compensated from the estate because the current version of

§ 330 is ambiguous and "the legislative history does not manifest an intent by Congress to change the long-standing practice of compensating debtors' attorneys"); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1056-61 (9th Cir. 1999) (finding § 330 to be "substantially ambiguous" and concluding that Chapter 7 debtor's attorney may be compensated from the estate based on legislative history and policy considerations); *see also In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 72 (2d Cir. 1996) (holding that the omission of debtor's attorney from § 330 was inadvertent and noting that "[w]here the benefits of services to the estate are the same, it makes no sense to treat performances of such benefits by debtors' attorneys differently than performances by other retained professionals").

On the other hand, the Trustee argues that the plain language of § 330, as it is now written, does not authorize compensation from the estate for the debtor's attorney in a Chapter 7 proceeding and that we should enforce the statute in its current form. As written, § 330(a)(1) plainly limits recovery of fees to "trustees," "examiners," and "professional persons employed under section 327 and 1103." While an attorney may be compensated from the estate as a professional person *employed by the Trustee under § 330(a)(1)(A)*, he is not directly payable as the *debtor's* attorney.

The Trustee also asserts that there are policy reasons supporting the 1994 change. He points out that in Chapter 7 proceedings, unlike proceedings under Chapters 11, 12, and 13, the debtors and creditors do not act like a team. Moreover, in a Chapter 7 proceeding, the Trustee is authorized to hire attorneys at estate expense as needed to help liquidate the estate, negating the need for the assistance of the debtor's attorney. Finally, the Trustee points out that in a Chapter 7 proceeding, a debtor's attorney cannot do the type of good work that could enlarge the estate in a Chapter 11 proceeding because a Chapter 7 proceeding is a zero-sum game. Inherent

in the Trustee's argument is the fact that, unlike a proceeding under Chapter 11, where the debtor-in-possession is the trustee of the estate, in a Chapter 7 proceeding the debtor and the Trustee are distinct. In sum, the Trustee argues that Congress deliberately, and for good reason, excluded the debtor's attorney from the list of parties that may be compensated from the debtor's estate in a Chapter 7 proceeding. The Trustee's argument is supported by decisions in two circuits. *See In re Am. Steel Products, Inc.*, 197 F.3d 1354, 1355-56 (11th Cir. 1999) (finding § 330 to be unambiguous and holding that a debtor's attorney cannot be compensated from the estate in a Chapter 7 proceeding); *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414, 424-26 (5th Cir. 1998) (recognizing the likelihood that Congress inadvertently deleted debtor's attorneys from § 330, but nonetheless finding the language of the statute to be unambiguous in its exclusion of debtor's attorneys from those parties that may be compensated from the estate).

While we recognize that the circuits are split and that arguments may reasonably be made that Congress made an inadvertent error in amending § 330(a), we conclude that we should follow the plain language of the 1994 version of § 330(a), particularly because application of that plain language supports a reasonable interpretation of the Bankruptcy Code. The 1994 version clearly omits the prior authorization to compensate the debtor's attorney from a Chapter 7 estate. And the reference to "attorney" in § 330(a)(1)(A) does not make the statute ambiguous. "[A] professional person employed under section 327 or 1103," 11 U.S.C. § 330(a)(1) (2000), could be the antecedent to "attorney" as used in § 330(a)(1)(A), because the Trustee is authorized to hire an attorney as a professional person. Section 327(a) specifically states that "the trustee, with the court's approval, may employ one or more *attorneys*, accountants, appraisers, auctioneers, or other professional persons . . . to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. § 327(a)

(emphasis added). While the reference in § 330(a)(1)(A) to "attorney" may be superfluous, it does not render the statute ambiguous. In addition, the omission of the conjunction "or" in § 330(a)(1) after the word "examiner," is an oversight that is as consistent with the *deliberate* deletion of the words "debtor's attorney" as it is with the inadvertent deletion of those words from that section. Thus, this oversight does not render the language ambiguous.

We agree with the Fifth Circuit, that "[w]e must presume . . . that Congress intended what it said when it revised § 330 to delete any provision for the award of compensation to a debtor's attorney in . . . a Chapter 7 . . . case." *Am. Steel Products*, 197 F.3d at 1356. When a statute is unambiguous, canons of construction prevent us from considering outside sources, such as legislative history, to attempt to discern what Congress may or may not have intended to do. *Id.*; *Pro-Snax Distributors*, 157 F.3d at 425.

The current version of § 330(a) has been in force now for eight years and Congress has not elected to recognize that it made a scrivener's error when it amended the statute in 1994. If Congress did indeed make an error, the error should be corrected by Congress, not by us. Because the plain language of § 330(a) as it is now written is unambiguous and is reasonable in application, we are constrained to enforce the language as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). In doing so, we join the Fifth and the Eleventh Circuits that have done likewise.

III

Despite the district court's conclusion that § 330(a) does not authorize Lamie, as the debtor's attorney, to be compensated from the bankruptcy estate, the court concluded that the prepetition retainer was property of the estate only to the extent that it exceeded the total fees and services allowed to the debtor's counsel for all services rendered in the case,

including services rendered after its conversion to a Chapter 7 proceeding.

The Trustee appeals this ruling, contending that the retainer became the property of the bankruptcy estate at the time the original Chapter 11 petition was filed because it was a "security retainer" and thus remained the property of the debtor until it was earned by Lamie. The Trustee therefore argues that any unearned portion of the retainer became property of the estate when the initial petition was filed, and Lamie was not entitled to fees *from the estate* with respect to services rendered after the Chapter 7 conversion. Lamie, on the other hand, responds by arguing that all fees with respect to the bankruptcy proceeding were paid in advance by Equipment Services in the form of the retainer. Thus, he was entitled to bill all of his fees, including those incurred after the Chapter 7 conversion, against the retainer. He asserts that only the portion of the retainer remaining after payment of all attorneys fees and costs belongs to the estate, *i.e.*, $5,000 minus $2,328.85, or $2,671.15.

The parties do not dispute the general principle that, at the time the Chapter 11 proceeding was filed, the property of Equipment Services, "wherever located and by whomever held," became the bankruptcy estate. 11 U.S.C. § 541(a). And Equipment Services' property interests at the time it filed the petition are generally determined as a matter of state law; both parties recognize that "courts look to state law when determining a debtor's interest in property." *See In re Shearin*, 224 F.3d 346, 349 (4th Cir. 2000). In this case, the applicable Virginia law is simply the law of contracts under which fee arrangements between clients and lawyers are enforced, subject to ethical and public policy restrictions not applicable here.

Thus, the question becomes what the arrangement between Lamie and Equipment Services was, because only with that understood can we determine whether any amount of the retainer constituted property of Equipment Services at

the time the Chapter 11 petition was filed. Retainer agreements can take various forms. For example, a retainer can be paid simply to ensure an attorney's availability to represent the client, whether or not services are ever performed. Or a retainer can be a prepayment for all future services to be performed, amounting to a flat fee. Under either one of these arrangements, the attorney acquires title to the retainer fee at the time he receives it, regardless of whether he thereafter performs legal services for the client. *See Indian Motorcycle Assocs. v. Mass. Housing Finance*, 66 F.3d 1246, 1254 (1st Cir. 1995). On the other hand, if the relationship is a trust arrangement in which the attorney holds the retainer for the client as security for the payment of future fees, then the retainer so held, less any fees charged against it, constitutes the property of the client. *See Indian Motorcycle*, 66 F.3d at 1255; *see also* 11 U.S.C. § 541(a). Indeed, Virginia's disciplinary rules demand that an attorney hold a retainer of this type in trust for the client. *See In re Prudoff*, 186 B.R. 64, 67 (Bankr. E.D. Va. 1995) (citing Va. Rules Discip. P. § 9-102).

In this case, the facts relating to the fee arrangement are not in dispute. Lamie was paid $6,000 to secure fees that he thereafter earned, and under the arrangement, as he earned fees, he became entitled to pay himself from the $6,000 sum. But until he earned fees, the account remained the property of Equipment Services so that in the end, if any of the $6,000 remained, Lamie would be required to return the balance to Equipment Services.

Accordingly, at the commencement of this action, Lamie had earned, charged, and paid himself $1,000 in fees for the preparation and filing of the Chapter 11 petition. The remaining $5,000 in Lamie's trust account therefore became property of the bankruptcy estate, under 11 U.S.C. § 541(a), when the Chapter 11 petition was filed.

During the Chapter 11 proceeding, Lamie worked for the debtor-in-possession, and the bankruptcy court authorized

that arrangement. Accordingly, the sum of $1,325 in fees earned and the $3.85 in costs incurred by Lamie while Equipment Services was "in Chapter 11" was payable from the $5,000 held by Lamie as part of the bankruptcy estate. Payment of that amount has been approved by the bankruptcy court and the district court, and it is not disputed by the Trustee. Thus, at the time the Chapter 11 proceeding was converted to a Chapter 7 proceeding, the $5,000 escrow account was subject to charges of $1,328.85, leaving the remaining $3,671.15 as part of the bankruptcy estate.

When the Chapter 11 proceeding was converted to a Chapter 7 proceeding, however, the bankruptcy estate became committed to the custody and control of the United States Trustee, and the $3,671.15 in Lamie's escrow account remained part of that estate. Under 11 U.S.C. § 330(a), as we have construed it, Lamie could not be paid fees from the estate while the proceeding was under Chapter 7. Moreover, the Trustee did not exercise his authority to retain Lamie during the Chapter 7 proceeding. Accordingly, even though Lamie incurred an additional $1,000 in fees on behalf of Equipment Services after the Chapter 7 conversion, he was not entitled to recover that amount *from the estate*. *See Indian Motorcycle*, 66 F.3d at 1255; *In re Prudoff*, 186 B.R. at 67.

In sum, of the $6,000 retainer held by Lamie on behalf of Equipment Services, $1,000 was properly paid to him for prepetition work; $1,328.85 is payable to him for work performed during the Chapter 11 proceeding; and $3,617.15 belongs to the estate. The judgment of the district court is, accordingly, affirmed in its construction of 11 U.S.C. § 330(a) and insofar as it awarded Lamie fees before the Chapter 7 conversion and is reversed insofar as it awarded Lamie fees for work performed after the Chapter 7 conversion.

AFFIRMED IN PART, REVERSED IN PART.

MICHAEL, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from part II of the majority's opinion, but otherwise concur. Specifically, I agree with the majority's conclusion in part III of its opinion that the unearned portion of Lamie's retainer became property of the bankruptcy estate when Equipment Services filed its Chapter 11 petition. It follows that if Lamie can be compensated at all for the legal services he rendered after the conversion of the company's bankruptcy proceeding from Chapter 11 to Chapter 7, his compensation must come from the bankruptcy estate. As the majority acknowledges, the question of whether 11 U.S.C. § 330(a) allows a Chapter 7 debtor's attorney to be paid professional fees from the bankruptcy estate is a close one. Because the arguments on both sides of this question have been well developed by the majority and by panels from other circuits, there is nothing left for me to do but choose a side. I cannot side with the majority. Rather, I agree with the Third and Ninth Circuits, which hold that when Congress amended § 330(a) in 1994, it inadvertently deleted debtors' attorneys from the existing statutory list of those who could be paid from the bankruptcy estate for services rendered in bankruptcy proceedings. *See In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130 (3d Cir. 2000); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1061 (9th Cir. 1999). This drafting error should not prevent a Chapter 7 debtor's attorney from being paid with funds from the estate, just as he could be before the error occurred.

Here, Lamie is entitled to reasonable compensation from the bankruptcy estate for the legal services he rendered after the Chapter 7 conversion to the extent that those services were "reasonably likely to benefit the debtor's estate" or were "necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(ii). Because neither the bankruptcy court nor the district court regarded Lamie's post-Chapter 7 fees as compensation from the bankruptcy estate, they did not evaluate his fee application under this standard. Accordingly,

I would vacate the award of attorney's fees to Lamie for his post-Chapter 7 services and would remand for the bankruptcy court to evaluate Lamie's fee application under the proper standard. I concur in the majority's opinion insofar as it affirms the award of attorney's fees to Lamie for his services before the Chapter 7 conversion.

IN RE EQUIPMENT SERVICES, INC.,
Debtor
UNITED STATES TRUSTEE, Appellant,
v.
EQUIPMENT SERVICES, INC., Appellee.

Case No. 1:00CV0014, 7-98-04851-WSA

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

OPINION

JONES, District Judge.

The question in this bankruptcy case is whether a debtor's attorney is entitled to payment of a fee from a pre-petition retainer held by the attorney, for services rendered after the bankruptcy case had been converted to chapter 7. While I hold that a 1994 amendment to the Bankruptcy Code withdrew the power of the bankruptcy court to award a fee to a chapter 7 debtor's attorney from the funds of the bankruptcy estate, I find that it was permissible under the facts of this case for the debtor's attorney to be paid from the pre-petition retainer.

I

The debtor, Equipment Services, Inc., filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on December 24, 1998. Prior to this filing the attorney for the debtor received the sum of $6,000 from his client. Of this amount, $1,000 was used to pay certain costs in connection with the bankruptcy case, including the filing fee of $830. The remainder of $5,000 was deposited in the attorney's trust account. While there was no written agreement between the client debtor and the attorney, the attorney represented to the

bankruptcy court that this amount was a retainer, and explained the understanding concerning its use as follows:

> MR. LAMIE: Well, the retainer was to pay me in advance for fees that I would earn during the case, Your Honor. And it was to assure some payment of those fees. That is the reason. That is the way we explained to the client.
>
> THE COURT: Was it your understanding that any unused fees at the end of the case would be, in effect, refunded back to the Debtor?
>
> MR. LAMIE: Oh, it would be the Debtor's property at the end of the case, yes, Your Honor.
>
> THE COURT: So the effect it [sic] to protect you . . . you know, your ability to get paid, is what you were doing?
>
> MR. LAMIE: Yes. Yes, the money was put into trust and is billed against it. That is the way we have handled it.

(Tr. 6.) This payment to the attorney was duly disclosed at the time of the filing of the voluntary petition.[4]

After the filing of the chapter 11 petition, the attorney for the debtor was employed with the permission of the bankruptcy court to represent the debtor-in-possession. Thereafter, however, on March 17, 1999, on the motion of the United States trustee,[5] the case was converted to chapter 7

---

[4] Section 329 of the Bankruptcy Code requires an attorney representing a debtor to file with the bankruptcy court a statement of compensation paid "for services rendered or to be rendered in contemplation of or in connection with the case . . . ." The section further provides that "[i]f such compensation exceeds the reasonable value of any such services," the court may cancel the fee agreement or order the return of the excessive amount. 11 U.S.C.A. § 329(a) (West 1993).

[5] United States trustees are officials of the Department of Justice and are responsible for the appointment and supervision of

and a trustee was appointed to administer the bankruptcy estate. Some fourteen months later, on June 5, 2000, the attorney for the debtor filed an application seeking approval of attorney's fees in the amount of $2,325 and expenses of $3.85 for services rendered from December 24, 1998, the date of filing of the chapter 11 petition, through May 31, 2000.

The United States trustee objected to this application to the extent that it sought payment for services rendered after the date of conversion of the case to chapter 7.[6] Following a hearing, the bankruptcy court (Stone, J.), by written opinion, sustained the objection to any payment to the attorney for services rendered after the date of conversion *only* to the extent that the funds held in retainer were insufficient to cover the total fees and expenses allowed in the case. *See In re Equip. Servs., Inc.*, 253 B.R. 724, 733-34 (Bankr. W.D. Va. 2000).

Based on this opinion, the bankruptcy court entered an order allowing the attorney a fee of $1,000 for services rendered after the date of conversion and further ordered that the attorney turn over to the trustee the balance of any funds held in retainer after deducting amounts allowed by the court for services rendered and expenses incurred in the chapter 7 case.

The United States trustee timely noted an appeal from this order and the debtor thereafter noted a cross-appeal.[7] The

---

bankruptcy trustees and the supervision of the administration of bankruptcy cases. *See* 28 U.S.C.A. § 586 (West Supp. 2000). A United States trustee may raise, appear and be heard on any issue. *See* 11 U.S.C.A. § 307 (West 1993).

[6] Without objection, the bankruptcy court approved a fee of $1,325 and expenses of $3.85 for services rendered *prior* to the date of conversion of the case to chapter 7. The remaining requested amount of $1,000 represented services rendered *after* the date of conversion.

[7] The debtor objects to the bankruptcy court's holding that the Bankruptcy Code does not permit compensation for the debtor's

issues have been briefed and argued and the case is ripe for decision.[8]

II

The bankruptcy court held, as urged by the United States trustee, that the Bankruptcy Code, by virtue of its 1994 amendment, does not permit the attorney for a debtor to be compensated from funds of the bankruptcy estate in a chapter 7 case. Nevertheless, the bankruptcy court held that the bankruptcy estate has a property interest in a pre-petition attorney's retainer only to the extent that there are any funds left over after all of the attorney's fees and expenses have been paid from the retainer. Accordingly, the bankruptcy court found that it was proper for it to approve attorney's fees and expenses to be paid from the pre-petition retainer, even for services performed for the debtor after conversion of the case to chapter 7.

It is first necessary for me to determine whether the bankruptcy court was correct in its holding that the Bankruptcy Code does not allow a chapter 7 debtor's attorney to be paid from the funds of the bankruptcy estate. If the bankruptcy court was in error in this regard, then further analysis of the nature of the estate's property interest in the pre-petition retainer is unnecessary.

This court reviews the bankruptcy court's decisions on questions of law de novo. *See Chmil v. Rulisa Operating Co.*

---

attorney in chapter 7 case to be paid from the funds of the bankruptcy estate.

[8] No stay of the bankruptcy court's order was obtained and the attorney's fee has now been paid from the attorney's trust account. Based on this payment, the debtor has moved to dismiss the appeal as moot. However, all of the parties are before the court and the court thus has the power to undo the payment. Accordingly, the appeal is not moot and the motion to dismiss will be denied. *See In re Harborview Dev. 1986 Ltd. P'ship*, 149 B.R. 378, 383 (D.S.C. 1993).

(In re Tudor Assocs., Ltd., II), 20 F.3d 115, 119 (4th Cir. 1994).

III

The first question for resolution involves the mysterious disappearance from the Bankruptcy Code of the language that expressly authorized a fee award to the debtor's attorney in chapter 7 cases. As originally adopted in the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)--which established the present Bankruptcy Code--the statute in question provided, in pertinent part, as follows:

> (a) After notice to any parties in interest and to the United States Trustee and a hearing, and subject to sections 326, 328 and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*--
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses.

11 U.S.C.A. § 330(a) (West 1994) (emphasis added).

In an effort to accommodate contemporary economic developments, Congress amended the Bankruptcy Code by the Bankruptcy Reform Act of 1994 ("the 1994 Act"). *See* Pub. L. No. 103-394, 108 Stat. 4106 (1994).[9]

---

[9] The 1994 Act, among other things, established a bankruptcy review commission, amended the code in certain respects regarding its application to cases involving commerce, credit, and individual debtors, and added a temporary chapter to govern reorganization of

In its markup of the 1994 Act, designated S. 540, the Senate Judiciary Committee replaced the original language of § 330(a) and inserted the following:

> (a)(1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328 and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, *or the debtor's attorney*, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28 --
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
> >
> > (B) reimbursement for actual, necessary expenses.

S. Rep. No. 103-168, 1993 WL 444315, at *247 (emphasis added). A new subsection, designated § 330(a)(3), articulated the manner in which a "reasonable" fee was to be calculated. *See id.*

On April 21, 1994, Senator Metzenbaum introduced a floor amendment that deleted the last clause from § 330(a)(1) regarding comments and objections by the United States trustee to fee awards and moved the language to a new subsection (a)(2). *See* 140 Cong. Rec. S4741 (daily ed. Apr. 21, 1994), WL 140 Cong. Rec. S4741-01, at *4741. The amendment also deleted the preceding four words, "or the debtor's attorney." *See id.* The amendment was adopted and S. 540, as amended, was approved by the Senate that day. *See* 140 Cong. Rec. S4676 (daily ed. Apr. 21, 1994), WL 140 Cong. Rec. S4666-02, at *4676.

---

small business. *See* S. Rep. No. 103-168 (1993), 1993 WL 444315, at *1.

During consideration later that year of the 1994 Act by the House of Representatives, the issue of the deletion of the "debtor's attorney" clause was specifically brought to the attention of legislators by the National Association of Consumer Bankruptcy Attorneys. Addressing the Metzenbaum amendment, the Association called the clause's deletion "apparently inadvertent" and a "drafting error[]." *Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on Econ. and Commercial Law of the House Comm. on the Judiciary*, 103d Cong. 550-51 (1994). Nevertheless, the Metzenbaum amendment became part of the text of the final legislation passed by the House. *See* Pub. L. 103-394, § 225(b), 108 Stat. at 4130.

Accordingly, the version of § 330 that became law reads in part as follows:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328 and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103-
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
> >
> > (B) reimbursement for actual, necessary expenses.

11 U.S.C.A. § 330(a)(1) (West Supp. 2000).[10]

---

[10] Also enacted as part of the 1994 amendments was the following provision:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

No principled reason appears in any legislative history for the removal of the crucial words, nor is there a record of any debate of the deletion. In 1997, two bills were introduced that included provisions that would have added the "debtor's attorney" language back to § 330(a). *See* H.R. 120, 105th Cong. § 7 (1997), WL 1997 CONG US HR 120; H.R. 764, 105th Cong. § 4 (1997), WL 1997 CONG US HR 764. Neither of those measures passed.

The question is whether the deletion of the "debtor's attorney" language in § 330(a)(1) was an unintended error and thus should be disregarded, or whether the language of the 1994 amendment, being plain, must be enforced. On this question judicial decisions have divided.[11]

---

11 U.S.C.A. § 330(a)(4)(B) (West 2000). Sections 327 and 1103, referred to in § 330(a)(1), relate to professional persons employed by trustees and committees of creditors. Since a debtor in possession has the powers of a trustee, the attorney selected by the debtor in possession in a chapter 11 case may receive a fee award as a "professional person employed under section 327." *See* § 330(a)(1).

[11] *Compare In re Top Grade Sausage, Inc.*, 227 F.3d 123 (3d Cir. 2000); *United States Trustee v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.)*, 195 F.3d 1053 (9th Cir. 1999); *In re Ames Dep't Stores, Inc.*, 76 F.3d 66 (2d Cir.1996); *United States Trustee v. Eggleston Works Loudspeaker Co. (In re Eggleston Works Loudspeaker Co.)*, 253 B.R. 519, 524 (B.A.P. 6th Cir. 2000); *Towarnicky, P.L.L.C. v. Peyton (In re Taylor)*, 250 B.R. 869 (E.D. Va. 2000); *In re Brierwood Manor, Inc.*, 239 B.R. 709 (Bankr. D.N.J. 1999); *In re Bottone*, 226 B.R. 290 (Bankr. D. Mass. 1998); *and In re Miller*, 211 B.R. 399 (Bankr. D. Kan. 1997) (declining to enforce amendment); *with Inglesby, Falligant, Horne, Courington & Nash v. Moore (In re Am. Steel Prod., Inc.)*, 197 F.3d 1354 (11th Cir. 1999); *Andrews & Kurth, L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414 (5th Cir. 1998); *In re Skinner*, 240 B.R. 225 (Bankr. W.D. Va. 1999); *In re Fassinger*, 191 B.R. 864 (Bankr. D. Or. 1996); *In re Friedland*, 182 B.R. 576 (Bankr. D. Colo. 1995); and *In re Kinnemore*, 181 B.R. 520 (Bankr. D. Idaho 1995) (enforcing language as written). The Fourth Circuit has yet to rule on the question.

Those courts declining to give effect to the 1994 amendment as a "scrivener's error" point to (1) the ambiguity created in the statute by the mention of "attorney" in § 330(a)(1)(A) when § 330(a)(1) is read to exclude the "debtor's attorney" clause; (2) the omission of a disjunctive "or" before the "professional person" clause within subsection (a)(1); and, perhaps most importantly, (3) the legislative history suggesting that the deletion of the "debtor's attorney" clause was unintentional.

The question is not free from doubt. It is easy to believe that the explanation for the disappearance of "or the debtor's attorney" in § 330(a)(1) is simply that the author of the Metzenbaum amendment inadvertently "crossed out a few too many words" when removing the United States trustee language. *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1059-60. Nevertheless, the necessarily limited role of judicial interpretation of legislative acts convinces me to enforce the statute as written.[12]

---

[12] Unless there is some ambiguity in the language of the statute, a court's analysis must end with the language of the statute. *See Selgeka v. Carroll*, 184 F.3d 337, 342-43 (4th Cir. 1999). This rule is departed from only in those rare and "exceptional circumstances," *Burlington N. R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 441 (1987), where "a literal reading of [the] statute [will] produce a result 'demonstrably at odds with the intentions of its drafters,'" *United States v. Locke*, 471 U.S. 84, 93 (1985) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)), "where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute," *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (citing *Commissioner v. Brown*, 380 U.S. 563, 571 (1965)), or where "an absolutely literal reading of a statutory provision is irreconcilably at war with the clear congressional purpose, [in which case] a less literal construction

There are doubtless strong policy reasons for *not* omitting a chapter 7 debtor's attorney from eligibility for fees paid from the debtor's estate, particularly since § 330 limits compensation to those services "reasonably likely to benefit the debtor's estate." 11 U.S.C.A. § 330(a)(4)(A)(ii)(I). But judges are accustomed to enforcing laws that they consider unwise.[13] It was not irrational--even if bad policy--for Congress to have decided to preclude payment of such fees altogether, even assuming that there was likely benefit to the estate.[14]

Moreover, while the resulting sentence is awkward, it is not "nonsensical," *see Andrews & Kurth, L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 425 (5th Cir. 1998), and it is possible that the reference to "attorney" in § 330(a)(1)(A) was simply meant to emphasize that an attorney employed by a trustee might be eligible for an award. *See In re Century Cleaning Servs., Inc.*, 195 F.3d at 1063 (dissenting opinion).

Finally, legislative history is generally irrelevant when the words of a statute are plain. *See Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 304-05 (4th Cir. 2000). In any event, the passage of the 1994 Act by the House of Representatives after it was apparent that the Senate had removed the "debtor's

---

must be considered." *United States v. Compos-Serrano*, 404 U.S. 293, 298 (1971).

[13] As the Fourth Circuit recently observed when faced with similar question: "What we are being asked to do is improve the statute—to amend it, really. The [proponent's] reading of the statute may be appealing in terms of its logic, but we cannot adopt it as our own without trespassing on a function reserved for the legislative branch." *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 (4th Cir. 2000).

[14] For example, "[o]ne of the primary considerations in passing the [1994] Act was the perceived problems with professional fees." *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1064 (dissenting opinion).

attorney" language, and the failure of later legislative efforts to put the words back into the statute, do not support the theory of a scrivener's error.

For these reasons, I find that the bankruptcy court was correct in finding that the debtor's attorney here was not entitled to an award of attorney's fees for services rendered after the case was converted to chapter 7.

IV

Since I find that the Bankruptcy Code does not allow the debtor's attorney here to be awarded a fee from the bankruptcy estate, the remaining question is whether the attorney may satisfy any fee attributable to services after the chapter 7 conversion from the pre-petition retainer held by him. The bankruptcy court answered that question in the affirmative, and I agree.

The Bankruptcy Code broadly defines property of the estate, *see* 11 U.S.C.A. § 341(a(1) (West 1993 & Supp. 2000), but the nature of the property interest must be generally determined by reference to state law, *see Butner v. United States*, 440 U.S. 48, 54-55 (1979), and any limitations on that interest imposed by state law may be applicable in bankruptcy. *See Bd. of Trade of Chicago v. Johnson*, 264 U.S. 1, 12 (1924).

The bankruptcy court reasoned that since the debtor had the right under state law only to the return of any unearned portion of the retainer, and since the attorney had continued to represent the debtor after the conversion of the case to chapter 7, thus continuing to "earn" the retainer, the attorney was entitled to be compensated.

There is no doubt that under the contractual arrangement between the debtor and his attorney here, the attorney is obligated to return any unearned portion of the retainer. Indeed, under Virginia law, an attorney, by virtue of professional obligation and even absent any agreement, must return any portion of a fee unearned at the termination of

employment. *See* Va. Rules of Prof. Conduct 1.16(d) (Michie 2000).

In the present case, however, the fee paid to the attorney was not unearned simply because the case was converted to chapter 7. While a chapter 7 debtor's attorney may not be entitled under the Bankruptcy Code to compensation from the estate, the debtor is not prohibited from being represented and until such representation is ended, the debtor--and hence, the debtor's bankruptcy estate--is not entitled to a refund.[15]

Section 329 of the Bankruptcy Code clearly anticipates that pre-petition legal fees will be paid by debtors, and because of the potential for overreaching in such circumstances, gives the bankruptcy court broad power to cancel the agreement or order the return of any excessive payment. *See* 11 U.S.C.A. § 329(b) (West 1993). This provision, together with the trustee's power to avoid fraudulent transactions, helps insure that debtors' attorneys will only receive proper payments from pre-petition retainers.[16]

For these reasons, I find that the bankruptcy court was correct in allowing the debtor's attorney to receive fees from the pre-petition retainer.

---

[15] The United States trustee has not argued that the retainer agreement with the attorney here was rejected pursuant to the trustee's power to reject executory contracts. *See* 11 U.S.C.A. § 365 (West 1993 & Supp. 2000).

[16] In the objection to the application for attorney's fees, the United States trustee alternatively relied on the ground that the application "does not state what, if any, benefit the services rendered by the Applicant were to the estate." (R. at 13.) The bankruptcy court did expressly rule on this objection, but the United States trustee did not designate that failure as an issue on appeal (R. at 7) and has not urged reversal on that ground in brief or oral argument.

V

In accord with this opinion, a final judgment will be entered affirming the order of the bankruptcy court.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE: CHAPTER 7 EQUIPMENT SERVICES, INC.,
DEBTOR

IN RE: CHAPTER 7 NANCY STARR, DEBTOR

Nos. 7-98-04851, 7-99-00905

JOINT MEMORANDUM OPINION

The matters before this Court are the motions of Debtors' counsel for compensation for services rendered by counsel after these cases had been converted from Chapter 11.

BACKGROUND

In re: Equipment Services, Inc.

On December 24, 1998, Equipment Services, Inc. ("Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* Debtor's counsel, Mr. John Lamie, was counsel for the Debtor-in-Possession at the time of filing the petition and his continued employment was approved by Order of this Court dated January 26, 1999. In the Rule 2016 Disclosure, Debtor's counsel certified that he had received a $5,000 retainer.[17]

On March 17, 1999, by motion of the United States Trustee ("U.S. Trustee"), this case was converted to one under Chapter 7. After conversion, the U.S. Trustee appointed Robert E. Wick, Jr., as interim trustee. No trustee

[17] No written retainer agreement appears to have been entered into between the Debtor and Debtor's counsel.

was elected at the meeting of creditors and Mr. Wick became the permanent Chapter 7 Trustee. Mr. Wick continues to administer the Debtor's case.

On June 5, 2000, Debtor's counsel filed an Application for Fees seeking compensation for services rendered and expenses incurred from December 24, 1998, the filing date of the Debtor's Chapter 11 petition, through May 31, 2000, a date more than fourteen months after conversion of the Debtor's case to one under Chapter 7. The U.S. Trustee objected to the Application for Fees to the extent that the Application sought compensation for services rendered after the case was converted to one under Chapter 7 on March 17, 1999.[18] A hearing was held on this matter on July 6, 2000. At the hearing, the parties were provided an opportunity to submit written arguments to this Court.

In re Nancy Starr

On March 16, 1999, Nancy Starr ("Starr") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 101 *et seq.* Mr. Lamie was counsel for Starr at the time of filing the petition and his employment continued after conversion of Starr's case to one under Chapter 7. In the Rule 2016 disclosure, Starr's counsel certified that he had received a $950 retainer.[19] At the time of filing his Application for Fees, Starr's counsel held $880 in trust.

On December 8, 1999, by motion of the U.S. Trustee, this case was converted to one under Chapter 7. On February

[18] In the absence of objection to the Application for Fees to the extent that it sought compensation for services rendered and expenses incurred prior to the conversion of this case to one under Chapter 7, this Court approved the Application for Fees by Order dated July 10, 2000. Accordingly, Debtor's counsel has been awarded $1,325.00 for services rendered plus costs in the amount of $3.85.

[19] No written retainer agreement appears to have been entered into between Starr and Starr's counsel.

23, 2000, William E. Callahan, Jr., was appointed Chapter 7 Trustee at the meeting of the creditors pursuant to 11 U.S.C. § 341.

On June 28, 2000, Starr's counsel filed an Application for Fees seeking compensation for services rendered from March 12, 1999, a date prior to the filing date of Starr's Chapter 11 petition, through June 28, 2000, a date more than six months after conversion of Starr's case to one under Chapter 7. The Trustee objected to the Application for Fees to the extent that the Application sought compensation for services rendered after the case was converted to one under Chapter 7 on December 8, 1999.[20] A hearing was held on this matter on August 8, 2000.

ARGUMENTS OF COUNSEL[21]

The U.S. Trustee raises two objections to an award of attorney's fees to Debtor's counsel for services rendered after conversion of the Debtor's case to one under Chapter 7. First, the U.S. Trustee, citing the exclusion of debtors' attorneys from the list of persons eligible for compensation from the property of the estate under 11 U.S.C. § 330(a)(1),[22] disputes

---

[20] In the absence of objection to the Application for Fees to the extent that it sought compensation for services rendered and expenses incurred prior to the conversion of this case to one under Chapter 7, this Court approved the Application for Fees by Order dated August 9, 2000. Accordingly, Starr's counsel has been awarded $3,600.00 for services rendered plus costs in the amount of $15.84.

[21] Because the arguments of the U.S. Trustee and Trustee that are relevant to this decision are the same, and because the arguments of the U.S. Trustee have been fully briefed, this Court will refer to the arguments of the U.S. Trustee and the response of counsel for the Debtors thereto in rendering its decision in both matters before this Court.

[22] 11 U.S.C. § 330(a)(1) provides, "After notice to the parties in interest and the United States Trustee and a hearing, and subject to Sections 326, 328, and 329, the court may award to a trustee, an

the claim of Debtor's counsel that he is entitled to be compensated for services rendered after the conversion of the Debtor's case to one under Chapter 7. Second, the U.S. Trustee denies the right of Debtor's counsel to be compensated for services rendered after conversion from the funds held in trust by Debtor's counsel from the pre-petition retainer. The U.S. Trustee contends that the funds held in retainer were property of the Debtor prior to conversion and accordingly, became property of the estate at the time of conversion of the Debtor's case to one under Chapter 7. Because awards of compensation from property of the estate are governed by 11 U.S.C § 330, the U.S. Trustee asserts that Debtor's counsel is not eligible to be compensated from the funds held in retainer.

Conversely, Debtor's counsel contends that § 330(a)(1) does not preclude his being compensated for services rendered after the conversion of the Debtor's case to one under Chapter 7. Additionally, Debtor's counsel denies that the funds held in retainer at the time of conversion of the Debtor's case were rendered property of the estate at the time of conversion and therefore not available to compensate Debtor's counsel. Instead, Debtor's counsel claims the funds held in retainer remained property of the Debtor. Therefore, the award of compensation to Debtor's counsel is governed by § 329,[23] which allows the awarding of fees to counsel from property held by debtors, rather than by § 330.

---

examiner, a professional person employed under section 327 or 1103- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by such person; and (B) reimbursement for actual, necessary expenses."

[23] 11 U.S.C § 329 provides, "(a) Any attorney representing a debtor in a case under this title, or in connection with such case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after

DISCUSSION

In answering the question of whether Debtor's counsel is entitled to compensation for services rendered after conversion of the Debtor's case to one under Chapter 7 from the funds held in retainer, the Court must decide two questions:

1. Whether an attorney can be paid from the bankruptcy estate for services rendered to the Debtor in Chapter 7; and
2. If not, whether the unearned balance of a pre-petition retainer, as of the time of conversion, is part of the bankruptcy estate.

The Court will address these two questions in the order stated.

I. An attorney may not be paid from the bankruptcy estate for services to be rendered to the Debtor in a Chapter 7 case.

While this Court notes with respect the recent opinion of Judge Brinkema of the United States District Court of the Eastern District of Virginia in *In re Taylor*, 250 B.R. 869 (E.D. Va. 2000), which held that a debtor's attorney in a Chapter 7 case can be compensated from property of the estate for services which are beneficial to the estate, and the decisions to such effect of the Second Circuit Court of Appeals[24] and the Ninth Circuit Court of Appeals,[25] the latter

---

one year before the date of filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to —

(1) the estate if the property transferred— (A) would have been property of the estate; or (B) was to be paid by or on behalf of the debtor under a plan under Chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment."

[24] *In re Ames Dep't Stores, Inc.*, 76 F.3d 66 (2nd Cir. 1996).

having rendered its decision subsequent to the decision of Chief Bankruptcy Judge Ross W. Krumm of this Court in the case of *In re Skinner*, 240 B.R. 225 (Bankr. W.D. Va. 1999), which held to the contrary, the Court believes it should adhere to the *Skinner* ruling. It concludes that it should do so for two good reasons: first, such ruling is based on the most logical and apparent interpretation of the effect to the 1994 amendment of § 330 of the Bankruptcy Code, and second, uniformity of result within this District in an issue of importance in almost every Chapter 7 case, whether originally filed as such or converted from another chapter, is an important and worthy goal in and of itself. While the Court will treat the value of the second reason, uniformity of decision within this District, as self-evident, it believes that some comment on the correct meaning of § 330 is warranted.

To understand fully the conclusions of those courts which have held that an attorney rendering services to a Chapter 7 debtor cannot be paid from the bankruptcy estate, it is helpful to compare the language of § 330 of the Code before and after the 1994 amendment of that section. Both before and after the 1994 amendment of § 330, such section provided and continues to provide express authority for payment of counsel to a Chapter 12 or 13 debtor from the estate "based on a consideration of the benefit and necessity of such services to the debtor and other factors set forth in this section." 11 U.S.C. § 330(a)(4)(B). To state the obvious, Congress could have provided that a debtor's attorney in any bankruptcy proceeding could be paid from the estate.[26] It did not choose to do so even though compelling policy arguments

---

[25] *In re Century Cleaning Services, Inc.*, 195 F.3d 1053 (9th Cir. 1999).

[26] The authority for payment of counsel for a Chapter 11 debtor to be compensated from the estate while the debtor is a "debtor-in-possession" is based on the right of the debtor-in-possession as trustee to retain legal counsel. 11 U.S.C. §§ 327(a) and 1107(a).

might be marshaled in support of such a provision. With regard to a Chapter 7 debtor's attorney, prior to 1994 § 330(a)(1) provided as follows:

> After notice to any parties in interest and to the United States Trustee and a hearing and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, an examiner, to a professional person employed under section 327 or 1103 of this title, *or to a debtor's attorney* –
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, *or attorney*, as the case may be, based on the nature, the extent, and the value of such services other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses. (emphasis added)

After the 1994 amendment to such section, it read and still reads as follows:

> After notice to the parties in interest and the United States Trustee and a hearing subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, *or attorney* and by any professional person employed by an such persons; and (B) reimbursement for actual, necessary expenses. (emphasis added)

11 U.S.C. § 330(a)(1).

In *Taylor*, the District Court chose to adopt the minority position rejected by the Bankruptcy Court in *Skinner*, finding § 330(a)(1) to be ambiguous in its exclusion of debtors' attorneys from "the list of persons in § 330(a)(1) to whom compensation may be awarded" due to the missing

conjunction 'and' or 'or' "before the penultimate person listed." The District Court further supported its finding by noting that the "logical inconsistency" between § 330(a)(1)(A) allows those persons specified in (a)(1) to be awarded "reasonable compensation for actual, necessary services rendered by a trustee, examiner, professional person, or attorney. . ." This inconsistency, the District Court concluded, created a further ambiguity in the Bankruptcy Code because § 331 permits payments from the bankruptcy estate of interim compensation for "[a] trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103." 11 U.S.C § 331. Based upon these apparent ambiguities, the District Court chose to look beyond the statute itself to the legislative history of the statute. Prior to the Bankruptcy Reform Act of 1994, Section 330 provided for the award of fees to debtors' attorneys. Nothing in the legislative history of the Act explains why such provision was omitted from the current version of § 330(a)(1). The District Court chose to grasp this absence of legislative history as an opportunity to define the omission as inadvertent and therefore appropriate to disregard in its effort to interpret the present language of § 330(a)(1). Accordingly, the District Court, upon holding that § 330(a)(1) did not preclude the Bankruptcy Court from awarding the debtor's attorney post-petition fees, remanded the matter to the Bankruptcy Court for determination of which fees were of benefit to the estate and therefore eligible for compensation.

In addition to the reasoning expressed by Chief Judge Krumm in *Skinner*, this Court rejects the District Court's holding in *Taylor* and the minority position adopted therein for the following reasons. First, though grammatically awkward and arguably internally inconsistent with § 330(a)(1)(A), the current version of 330(a)(1) is the result of a deletion by Congress that resulted in a statute which is clearly at odds with its pre-amendment version. *See In re American Steel Product, Inc.*, 197 F.3d 1354, 1356 (11th Cir. 1999); *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414, 425

(5th Cir. 1998). Although the absence of legislative history and a brief review of the syntax of the statute might indicate that such deletion was inadvertent, the governing canons of construction do not allow this Court to consider extrinsic sources in interpreting § 330(a)(1).[27] *In re Pro-Snax Distributors, Inc.*, 157 F.3d at 425. Even if this Court were to conclude, however, that the deficiencies noted by Judge Brinkema in *Taylor* rendered the statute ambiguous, the absence of legislative history is open to two equally plausible interpretations, that the deletion of the language relating to the "debtor's attorney" was the result of clerical error, or that it was intentional on the part of the person or persons who directed its deletion for reasons known to him, her, or them and that such deletion simply passed through the legislative process without being particularly noticed or commented upon by those members of Congress who might have decided either to support or oppose such change. In the absence of legislative history or other evidence which would suggest clearly that the deletion was simply the result of clerical error, this Court cannot conclude that it should treat the statutory change as if it had not occurred. Furthermore, this Court notes the absence of a subsequent technical correction by Congress during the six years since the revision of § 330(a)(1),[28] despite substantial commentary on the subject

---

[27] This Court's finding that § 330(a)(1) is clear and unambiguous on its face preclude this Court form giving persuasive weight to the absence of legislative history regarding the deletion of debtor's attorney from the list of persons eligible for compensation pursuant to § 330(a)(1). *See In re Pro-Snax Distributors, Inc.*, 157 F.3d at 425.

[28] This Court notes that the current proposed Bankruptcy Reform Act of 2000, H.R. 833, 106th Cong. (2000), pending in the House of Representatives, makes no correction to § 330(a)(1) but does propose to amend § 330(a)(1) to read, "[I]n determining the amount of reasonable compensation to be awarded, to an examiner, trustee under Chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services,

and a general willingness of Congress to adopt such corrections when deemed necessary.[29]

Second, Section 330(a)(1) and § 331 are not inconsistent so as to render § 330(a)(1) ambiguous. The District Court cites § 331's allowance for debtors' attorneys to receive interim fees as support for the proposition that debtors' attorneys must be eligible for fees generally. However, the District Court failed to quote the pertinent language of § 330. Specifically, Section 331 states, in relevant part:

> A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such application or reimbursement for expenses incurred before such date *as is provided under section 330 of this title*. (emphasis added)

11 U.S.C. § 331.

Upon a further reading of § 331, it becomes apparent that § 331 cannot be read independently of § 330. *See* 3 Collier on Bankruptcy ¶ 331.01[4] at 331-7. Because § 330(a)(4)(B) expressly allows for compensation of attorneys representing individual debtors in case under Chapters 12 and 13, Section 331 must include debtors' attorneys so as not to bar awards of

---

taking into account all relevant factors. . ." Bankruptcy Reform Act of 2000, H.R. 833, 106th Cong. § 409 (2000).

[29] For example, Congress has enacted subsequent corrective legislation to cure errors in the Internal Revenue Code that arose from prior amendments and revisions thereof. One such piece of corrective legislation, aptly titled the Technical Corrections Act of 1982, Pub. L. No 97-448, 96 Stat. 2365 (codified as amended in scattered sections of 26 U.S.C.), served to cure errors in the Internal Revenue Code that arose from the Economic Recovery Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified as amended in scattered sections of 26 U.S.C.).

interim compensation to individual debtors' attorneys in cases under Chapters 12 and 13. Also, it is worth noting that some courts have denied the applicability of § 331 to Chapter 7 and Chapter 11 liquidation cases altogether, making any reference thereto irrelevant in matters of the sort at hand. *See In re Glados*, 83 F.3d 1360, 1365-66 (11th Cir. 1996) (dicta); *In re Regan*, 135 B.R. 216, 218-19 (Bankr. E.D.N.Y. 1992) (holding that professionals for a chapter 11 debtor-in-possession, which had been displaced by a Chapter 7 trustee, could not request interim compensation for services rendered while the case was under Chapter 11 to be paid during the pendency of the Chapter 7). *See also In re Domino Investments, Ltd.*, 82 B.R. 608, 609 (Bankr. S.D. Fla. 1988).

II. The unearned balance of a pre-petition retainer, as of the time of conversion to Chapter 7, is not part of the bankruptcy estate.

Subject to § 329, a retainer is an arm's length pre-petition transfer for services being rendered currently and to be rendered in the future. While a client may terminate an attorney's representation and recover back the unearned portion of funds held in retainer, the client cannot retain the benefit of the services being rendered and yet to be rendered by the attorney and at the same time demand a refund of the current unearned balance of the retainer. Only to the extent that a balance remains in the retainer after all services have been rendered and fees have been allowed under § 329 does the reversionary interest of the debtor in that balance become property of the bankruptcy estate.

Section 541(a) of the Bankruptcy Code states in relevant part that, "[t]he commencement of a case under section 301, 302, or 303 of this title creates an estate . . . comprised of all the following property, wherever located: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Fourth Circuit Court of Appeals stated in *Mid-Atlantic Supply Co. of VA v. Three Rivers Aluminum Co. (In re Mid-Atlantic*

Supply Co.), 790 F.2d 1121, 1124 (4th Cir. 1986), that "property of the estate" should be construed broadly. Property of the estate has been interpreted to include "property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced." *United States v. Whiting Pools, Inc.*, 462 U.S. 195, 205 (1983) (holding that the bankruptcy estate included property of the debtor which the Internal Revenue Service had lawfully seized before bankruptcy but had not sold prior to filing, noting that the property continued to be owned by the taxpayer until the sale had been effected). However, Section 541(a), while defining "property of the estate" to include all interests of the debtor, does not define those specific interests. To make that determination, it is necessary to examine relevant state law. *In re Prudoff*, 186 B.R. 64, 66 (Bankr. E.D. Va. 1995). The *Prudoff* case dealt with a note which a debtor had assigned pre-petition to an attorney to represent the debtor in a domestic relations case. The amount of the note exceeded $80,000 and the retainer agreement provided that the note was assigned absolutely to the attorney and the client's only interest was to any balance collected and not used for legal fees or expenses. The obligor of the note prepaid it and the attorney disbursed to the debtor post-petition in excess of $25,000 from the proceeds of the note. The Trustee brought a turnover action against the debtor and the court ruled that the debtor's interest in any refund from the retainer was property of the estate and the debtor was obliged to pay over the money received from the attorney to the trustee.

Virginia law offers no exception to the general rule that a retainer taken by a debtor's attorney for services to be rendered during the bankruptcy is to be held in trust for the debtor. Pursuant to Rule 1.16(d) of the Virginia Rules of

Professional Conduct,[30] an attorney is required, upon termination of representation, to refund any advance payment of fees that has not been earned. Rules of the Supreme Court of Virginia Part 6, § II. Additionally, Rule 1.15(a)[31] requires that all funds received or held by an attorney or law firm on behalf of a client, including refundable retainers, be deposited into an escrow account. In furtherance thereof, Rule 1.15(d)(3)[32] mandates first, that an attorney maintain complete records of all funds of a client coming into possession of the attorney and render appropriate accounts to the client regarding those funds and second, promptly pay or deliver to the client as requested the funds in possession of the attorney to which the client is entitled. *Id.* Although these Rules of Professional Conduct appear to indicate that property held by an attorney is held in trust for the benefit of the client, giving the client an equitable interest therein, these Rules do not state or imply that the client's equitable interest extends to funds which have been earned by the attorney. *Compare In re Downs*, 103 F.3d 472 (6th Cir. 1996) (holding that property held by an attorney is held in trust for the client's benefit, and the debtor's equitable interest in the trust is property of the estate).

This Court believes that a debtor's interest in a pre-petition retainer might be appropriately compared with other property interests a debtor may have as of the filing date which become assets of the bankruptcy estate. For example, if a debtor has paid, immediately preceding his filing, an annual insurance premium, the unearned portion of the premium as of the filing date may well be an asset of the

---

[30] Paragraph (d) of Rule 1.16 is based on DR 2-108(D) of the Virginia Code of Professional Responsibility, the predecessor to the Virginia Rules of Professional Responsibility.

[31] Paragraph (a) of Rule 1.15 is substantially the same as DR 9-102(A) of the Virginia Code of Professional Responsibility.

[32] Paragraph (d) of Rule 1.15 has no counterpart in the Virginia Code of Professional Responsibility.

bankruptcy estate, but unless some action is taken to cancel the policy prior to the end of the period of coverage in question, the estate cannot obtain a refund from the insurer, regardless of whether the policy in question or the property or interest it insured was an asset of the bankruptcy estate. Similarly, if a debtor has obtained pre-petition a line of credit secured by a lien against the debtor's property, such property becomes an asset of the estate subject to the existence of the lien. Assuming any necessary court approval for post-petition continued use of such line of credit, the bankruptcy estate's interest in the property would be in its residual value after the total amount of the debt, whether pre-petition or post-petition in nature, has been paid.[33] Even without any new principal advances under such a loan arrangement, however, Section 506(b) of the Bankruptcy Code recognizes that a secured creditor, to the extent of the available value of its collateral, is entitled to recover from that property, even though such property is clearly an asset of the bankruptcy estate, post-petition interest ("earnings," if you will) upon its principal balance. Even though an attorney may be required by ethical obligations to hold a retainer in escrow or trust until the contracted-for legal services have been rendered, the court does not believe that such requirement creates any greater property interest in the bankruptcy estate than if the attorney had been free simply to deposit the retainer in his general account subject to a potential refund obligation to the extent that the funds received from the retainer were not later fully earned. The ethical obligation imposed upon the attorney as a professional licensed by the state is for the protection of the client and should not furnish a basis to disallow in bankruptcy to an attorney the benefit of his arm's length and fair agreement with his client, subject to the Court's review authority under § 329 of the Bankruptcy Code. With due respect to the opinions of other courts that have drawn a

---

[33] The Court notes that any approved post-petition borrowing could properly be paid from other property of the estate.

distinction between "advance fee retainers" and "retainers for security"[34] this Court concludes that in either case it is the client's residual interest, if any, in the retainer after satisfaction of all contracted-for fees that becomes an asset of the bankruptcy estate. *See In re Feiler*, 218 F.3d 948 (9th Cir. 2000).

For the aforementioned reasons, this Court denies the U.S. Trustee's claim that a retainer, to the extent it exceeds the amount earned and allowed for Chapter 11 services rendered by Debtor's counsel, becomes property of the bankruptcy estate. The Court observes that while the U.S. Trustee's argument that a retainer is property of the bankruptcy estate is made in these cases which originally commenced as Chapter 11 cases but were later converted to Chapter 7, the same rationale would appear to be applicable to any original Chapter 7 case where the debtor's attorney has received a pre-petition retainer from the debtor. If such a retainer were to be subject to turnover to the Chapter 7 Trustee to the extent that it was not absorbed by filing fees and pre-petition services, a very powerful disincentive would be provided to attorneys to accept Chapter 7 cases in the first place, or to provide anything beyond the most perfunctory required post-petition services to the client in those Chapter 7 cases that were accepted. Particularly in the context of a Chapter 7 corporate debtor without interested, willing, and financially able owners or affiliates, the likelihood of payment for post-petition services by the debtor's attorney precluded from relying on his retainer for payment would appear to be doubtful at best. Accordingly, this Court denies

---

[34] *See e.g. Indian Motorcycle Assoc. III Ltd. Partnership v. Massachusetts Housing Fin. Agency*, 66 F.3d 1246 (1st Cir. 1995) (concluding that whether a retainer may be subject to turnover depends upon whether the retainer is paid simply to ensure the availability of an attorney or is held by an attorney to secure payment for legal services to be rendered). *See also* 3 Collier on Bankruptcy ¶ 329.04[1][d] at 329-20.

the U.S. Trustee's objection to payment of Debtor's counsel for services rendered after conversion of the Debtor's case to one under Chapter 7 from the funds held in retainer by Debtor's counsel pursuant to § 329 of the Bankruptcy Code.[35] While this Court recognizes the unsatisfactory potential consequences of a decision which places a premium upon a debtor's attorney obtaining a retainer large enough to cover in advance any and all legal services which might reasonably be contemplated during the entire case, and therefore rewards attorneys who may be more acutely protective of their own interests rather than those of their debtor clients, it believes to hold otherwise would be to disregard an express change by Congress of existing law prior to 1994. If that change was unintentional, it is up to Congress to correct it. If the change was intentional, it is the obligation of this Court to enforce it even if such change may appear to be misguided and disruptive of the functioning of the bankruptcy system.

CONCLUSION

For these reasons, this Court respectfully declines to follow the Eastern District Court's holding in *Taylor* and instead has chosen to apply the earlier holding of this Court as expressed in *Skinner*. It further holds that only the Debtor's reversionary interest in a pre-petition retainer paid over to his, her, or its attorney, rather than the retainer in full, is property of the bankruptcy estate. Accordingly, this Court sustains the U.S. Trustee's objection to payment of Debtor's counsel for

---

[35] Section 329 of the Bankruptcy Code governs the eligibility of debtors' attorneys to be compensated from funds held in retainer when such funds are not property of the estate. *In re Redding*, 247 B.R. at 478; *See also* 3 Collier on Bankruptcy ¶ 329.04[1][d] at 329-19. By its own language, Section 329 merely requires that fees to be awarded from funds held in retainer be reasonable in amount, as determined by the court. Because the balance of the pre-petition retainer, as of the time of conversion, is not property of the bankruptcy estate, Debtor's counsel is eligible to receive an award of fees pursuant to § 329.

services rendered after conversion of the Debtor's case to one under Chapter 7 only to the extent that the funds held in retainer are insufficient to cover the total fees and expenses allowed to Debtor's counsel for all services rendered in the Debtor's case. However, in rendering this judgment, this Court expressly refrains from addressing the issue of use of a pre-petition retainer to pay for services of post-petition benefit to a debtor personally, such as objections to discharge and/or dischargeability of debt litigation such as that considered in *In re Lilliston*, *supra*, an issue not presented in either of the cases before the Court.

Orders effectuating the opinion of this Court in these two cases shall be entered contemporaneously with the signing of this Memorandum Opinion.

ENTER this the 21st day of September, 2000.

William F. Stone, Jr.
U.S. Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 01-1779, BK-98-4851, CA-00-143
In Re: EQUIPMENT SERVICES, INCORPORATED
Debtor

UNITED STATES TRUSTEE
Plaintiff – Appellant

v.

EQUIPMENT SERVICES, INCORPORATED
Defendant – Appellee

No. 01-1779, BK-98-4851, CA-00-143
In Re: EQUIPMENT SERVICES, INCORPORATED
Debtor

UNITED STATES TRUSTEE
Plaintiff – Appellee

v.

EQUIPMENT SERVICES, INCORPORATED
Defendant – Appellant

On Petition for Rehearing and Rehearing En Banc

Appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

(2)

Supreme Court, U.S.
FILED

FEB 5 2003

No. 02-693

In the Supreme Court of the United States

JOHN M. LAMIE, PETITIONER

v.

UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
WILLIAM KANTER
SANDRA WIEN SIMON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

14 pp

QUESTION PRESENTED

Whether Section 330(a)(1) of the Bankruptcy Code, 11 U.S.C. 330(a)(1), authorizes a court to use the funds of a bankruptcy estate to compensate an attorney of a chapter 7 debtor.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

American Steel Prod., Inc., In re, 197 F.3d 1354 (11th Cir. 1999)	5, 9
Ames Dep't Stores, Inc., In re, 76 F.3d 66 (2d Cir. 1996)	5, 9
Century Cleaning Servs., Inc., In re, 195 F.3d 1053 (9th Cir. 1999)	5, 9
Hartford Underwriters Ins. Co. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000)	8
Pro-Snax Distribs., Inc., In re, 157 F.3d 414 (5th Cir. 1998)	5, 9
Top Grade Sausage, Inc., In re, 227 F.3d 123 (3d Cir. 2000)	5, 9
United States v. *Locke*, 471 U.S. 84 (1985)	8
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)	8

Statutes:

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 330, 92 Stat. 2564 (11 U.S.C. 330(a) (1994))	3
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224(b), 108 Stat. 4130 (11 U.S.C. 330(a)(1))	4
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:	2
ch. 3, 11 U.S.C. 301 *et seq.*:	
11 U.S.C. 307	2
11 U.S.C. 327	7, 9

Statutes—Continued: Page

11 U.S.C. 327(a) 2, 5
11 U.S.C. 330 ..... 3, 4, 5, 6, 7, 8, 9
11 U.S.C. 330 (Supp. IV 1986) 3
11 U.S.C. 330(a) 3, 5
11 U.S.C. 330(a) (1994) 3
11 U.S.C. 330(a)(1) 5, 7, 8, 9
11 U.S.C. 330(a)(4)(B) 4, 7, 9
ch. 7, 11 U.S.C. 701 *et seq.* 2, 3, 4, 5, 6, 7, 8, 9
ch. 11, 11 U.S.C. 1101 *et seq.* 2, 4, 5, 7, 9
11 U.S.C. 1103 7
11 U.S.C. 1107(a) 5, 9
11 U.S.C. 1112(b) 2
ch. 12, 11 U.S.C. 1201 *et seq.* 9
ch. 13, 11 U.S.C. 1301 *et seq.* 9
28 U.S.C. 586(a)(3)(A)(i) 2
28 U.S.C. 586(a)(3)(A)(ii) 2

In the Supreme Court of the United States

No. 02-693

JOHN M. LAMIE, PETITIONER

v.

UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 290 F.3d 739. The opinion of the district court (Pet. App. 15a-27a) is reported at 260 B.R. 273. The opinion of the bankruptcy court (Pet. App. 28a-44a) is reported at 253 B.R. 724.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2002. A petition for rehearing was denied on August 5, 2002 (Pet. App. 45a). The petition for a writ of certiorari was filed on November 4, 2002, a Monday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 24, 1998, Equipment Services, Inc., filed a voluntary petition for relief under the debt reorganization provisions of chapter 11 of the Bankruptcy Code. At the time of the filing and subject to court approval under 11 U.S.C. 327(a), the company had retained petitioner, an attorney, to represent it in the bankruptcy proceedings and had given petitioner a $6000 retainer, of which $1000 was used to pay the fees and costs of filing the petition. Petitioner deposited the remaining $5000 in an escrow account, to be drawn upon as petitioner earned fees. On January 26, 1999, the bankruptcy court approved petitioner's continued employment as the attorney for the debtor-in-possession in the chapter 11 proceeding. Pet. App. 2a, 28a.

In March 1999, on the motion of the United States Trustee, the proceeding was converted into a case under chapter 7 of the Code. Petitioner filed an application with the bankruptcy court seeking $2325 in attorneys fees, $1325 of which was earned during the chapter 11 proceeding and $1000 of which was earned during the chapter 7 proceeding. The United States Trustee objected to the application to the extent that it requested $1000 compensation for services rendered after the case was converted to a chapter 7 proceeding. Pet. App. 4a, 15a-17a, 29a.[1]

---

[1] The United States Trustee is charged with the responsibility to "supervise the administration of cases under * * * chapter 7, 11, 12, or 13 of title 11 by * * * reviewing * * * applications filed for compensation and reimbursement under section 330 of title 11[] and filing with the court" any "objections to such application." 28 U.S.C. 586(a)(3)(A)(i) and (ii). See also 11 U.S.C. 307 ("The United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this title.")

The bankruptcy court held that the Code did not authorize a chapter 7 debtor's attorney to be paid funds from the bankruptcy estate. Pet. App. 30a-38a. The court explained that, before the Code was amended in 1994, 11 U.S.C. 330 (Supp. IV 1986) had authorized an award to any debtor's attorney, but Congress in a 1994 amendment to Section 330 deleted the statutory language authorizing such an award. The court thus observed (Pet. App. 34a) that, as originally adopted, Section 330(a) provided that:

> After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons employed by such trustee, professional person, or attorney, as the case may be, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services, other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 330, 92 Stat. 2564 (codified at 11 U.S.C. 330(a) (1994) (emphasis added)). The court also observed (Pet. App.

34a) that, in 1994 Congress amended Section 330 to provide in relevant part:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—
>
> > (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
> >
> > (B) reimbursement for actual, necessary expenses.

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224(b), 108 Stat. 4130 (codified at 11 U.S.C. 330(a)(1)). The court further observed that Congress in 1994 added a separate provision to Section 330 that "provide[s] express authority for payment of counsel to a Chapter 12 or 13 debtor from the estate." Pet. App. 33a (citing 11 U.S.C. 330(a)(4)(B)). The court accordingly concluded that there was no authority to award fees to a chapter 7 debtor's attorney. The bankruptcy court nonetheless awarded petitioner fees for services rendered while the case proceeded under chapter 7 because the court concluded that the pre-petition retainer was not, under state law, property of the bankruptcy estate. *Id.* at 38a-43a.[2]

[2] On July 10, 2000, the bankruptcy court also approved petitioner's application for $1325 in fees earned for services rendered while the case was proceeding under chapter 11. Pet. App. 29a n.18. During that period, the debtor-company had received court approval to retain petitioner while it was a debtor-in-possession under chapter 11. As such, the Code granted the debtor-in-possession many of the statutory powers accorded to a trustee, 11 U.S.C. 1107(a), including authority to retain a professional person such as an attorney to represent the debtor in carrying out its duties as a trustee, 11 U.S.C. 327(a). See 11 U.S.C. 330(a)(1) ("the court may award [compensation] to * * * a professional person employed under section 327").

2. The district court affirmed. Pet. App. 15a. The court concluded that Section 330(a)(1) was "plain" in not authorizing fees to a chapter 7 debtor's attorney. *Id.* at 22a, 24a. The district court nonetheless agreed with the bankruptcy court's conclusion that, under state law, the retainer was not property of the estate and accordingly that petitioner was entitled to draw from the retainer fees earned during the chapter 7 proceeding. *Id.* at 25a-26a.

3. A divided panel of the court of appeals affirmed the district court's construction of Section 330, but the panel unanimously reversed the district court's conclusion that the retainer was not property of the bankruptcy estate. Pet. App. 1a-14a.[3] The court held that Section 330(a) does not authorize a chapter 7 debtor's attorney to be compensated from the estate. *Id.* at 5a-9a. The court explained that the Fifth and the Eleventh Circuits had reached similar holdings. *Id.* at 8a-9a (citing *In re American Steel Prod., Inc.*, 197 F.3d 1354, 1356-1357 (11th Cir. 1999); *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414, 425 (5th Cir. 1998)). The court also observed that three circuits had reached contrary results. *Id.* at 6a-7a (citing *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 130 (3d Cir. 2000); *In re Century Cleaning*

[3] Petitioner does not challenge the court of appeals' conclusion (Pet. App. 9a-12a) that the retainer was part of the bankruptcy estate. Pet. 8 n.2.

Servs., Inc., 195 F.3d 1053, 1056-1061 (9th Cir. 1999); *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 72 (2d Cir. 1996)).

In joining the Fifth and Eleventh Circuits, the court of appeals reasoned that "§ 330(a), as revised in 1994, omits the phrase 'or the debtor's attorney' from the list of persons to whom a court may award 'reasonable compensation' from the bankruptcy estate for services rendered in a Chapter 7 proceeding." Pet. App. 6a. The court concluded that, "[w]hile * * * the circuits are split and * * * arguments may reasonably be made that Congress made an inadvertent error in amending § 330(a)," the court "should follow the plain language of the 1994 version of § 330(a), particularly because application of that plain language supports a reasonable interpretation of the Bankruptcy Code." *Id.* at 8a. The court of appeals related (*id.* at 7a-8a) the United States Trustee's observations that legal services performed on behalf of a chapter 7 debtor do not enlarge the size of the estate and, in any event, a chapter 7 trustee may hire an attorney to perform any legal services necessary to liquidate the estate.

The court of appeals also observed that "[t]he current version of § 330(a) has been in force now for eight years and Congress has not elected to recognize that it made a scrivener's error when it amended the statute in 1994." Pet. App. 9a. Accordingly the court concluded that, "[b]ecause the plain language of § 330(a) as it is now written is unambiguous and is reasonable in application," the court was "constrained to enforce the language as written." *Ibid.*

Judge Michael dissented from the court's holding that Section 330 did not authorize the award of fees to a chapter 7 debtor. Pet. App. 13a-14a. In his view, "when Congress amended § 330(a) in 1994, it inadvertently deleted debtors' attorneys from the existing statutory list of those who could be paid from the bankruptcy estate for services rendered in bankruptcy proceedings." *Id.* at 13a. He accordingly believed that "[t]his drafting error should not prevent a Chapter 7 debtor's attorney from being paid with funds from the estate, just as he could before the error occurred." *Ibid.*

ARGUMENT

The court of appeals correctly concluded that Section 330 does not authorize an award of attorney fees to a chapter 7 debtor from the funds of the bankruptcy estate. We nevertheless agree with petitioner that the Court should grant certiorari in this case. The courts of appeals are divided on the question whether courts should apply Section 330 as if it contained the phrase "or the debtor's attorney" that Congress deleted in the 1994 amendments to Section 330, and the question is of recurring significance to the administration of bankruptcy proceedings under chapter 7 and chapter 11. Although the amount at issue in this case, and in these cases generally, is quite small, the issue has divided the courts of appeals and will continue to divide the circuits unless this Court resolves the issue.

1. The court of appeals correctly held that Section 330 is plain in not authorizing a court to award fees to a chapter 7 debtor's attorney. By its plain and express terms, Section 330(a)(1) authorizes only three classes of individuals to seek reimbursement of fees from bankruptcy estates—trustees, examiners, or professional persons employed by a trustee under Section 327 or by a committee authorized under Section 1103. 11 U.S.C. 330(a)(1). Section 330(a)(4)(B) also expressly authorizes

fees to "the debtor's attorney" "[i]n a chapter 12 or 13 case." 11 U.S.C. 330(a)(4)(B).

Petitioner does not contend that he falls into any of the express categories covered by Section 330(a)(1), or that there is any other provision of the Code that authorizes a chapter 7 debtor's attorney to seek compensation from funds of the bankruptcy estate. Rather, petitioner argues (Pet. 11) that this Court should read Section 330(a)(1) to include the phrase "or the debtor's attorney" that was deleted by the 1994 amendments because the deletion "was an inadvertent scrivener's error." Petitioner raises various arguments (Pet. 11-17) that allegedly support a conclusion that the deletion was a drafting error by Congress.

Courts, however, do not have "*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). When "the statute's language is plain, 'the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). None of petitioner's contentions shows that Section 330(a)(1) as it is currently written produces an absurd result that would justify authorizing a chapter 7 debtor's attorney from seeking funds from the estate when that authority was deleted from the statute by Congress in 1994.

2. Although the court of appeals' decision is correct, we agree with petitioner that the Court should grant certiorari in this case. The courts of appeals are divided on the question whether Section 330 should be read to contain the phrase "or the debtor's attorney" that the Congress deleted in the 1994 amendments to Section

330(a)(1). That issue has implications for two categories of attorneys who, under the Section 330(a)(1) as it is currently written, are not authorized to seek compensation from bankruptcy estate funds: chapter 7 debtors' attorneys and chapter 11 debtor-out-of-possession attorneys.[4]

In addition to the Fourth Circuit in this case, the Eleventh Circuit in *In re American Steel Product, Inc.*, 197 F.3d 1354, 1356-1357 (1999), has held that Section 330 plainly does not authorize attorneys for debtors under chapter 7 to seek an award of fees. Similarly, the Fifth Circuit in *In re Pro-Snax Distributors, Inc.*, 157 F.3d 414, 425 (1998), has held that Section 330 is plain in not authorizing attorneys for debtors-out-of-possession under chapter 11 to seek an award of fees. By contrast, the Ninth Circuit in *In re Century Cleaning Services, Inc.*, 195 F.3d 1053, 1060 (1999), has held that the court may award fees to a chapter 7 debtor's attorney, reasoning that deletion of the four words "or the debtor's attorney" in the 1994 amendments "resulted from an unintended slip of the pen and not from a deliberate change." The Third Circuit in *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 128 (2000), likewise has held that the Code permits an attorney for a chapter 11 debtor-out-of-possession to seek an award of fees, agreeing with the Ninth Circuit's conclusion that "courts should read 'debtor's attorney' back into the statute." The Second Circuit in *In re Ames Department Stores, Inc.*, 76 F.3d 66, 71-72 (1996) in dicta simi-

---

[4] Section 330 authorizes a court to use bankruptcy estate funds to award fees to attorneys for chapter 12 and chapter 13 debtors. 11 U.S.C. 330(a)(4)(B). The Code also authorizes compensation to attorneys for chapter 11 debtors-in-possession. 11 U.S.C. 327, 330(a)(1), 1107(a) (see note 2, *supra*).

larly has indicated that it is "inclined to agree" that the omission of the phrase "the debtor's attorney" from the coverage of the amended Section 330 "was inadvertent." That conflict is mature, deep, and implicates a recurring issue that is important to the administration of bankruptcy proceedings and that should receive uniform treatment throughout the Nation. This Court's review is accordingly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
WILLIAM KANTER
SANDRA WIEN SIMON
Attorneys

FEBRUARY 2003

(3)

Supreme Court U.S.
FILED
FEB 7 2003
OFFICE OF THE CLERK

No. 02-693

IN THE

Supreme Court of the United States

JOHN M. LAMIE,

Petitioner,

v.

UNITED STATES TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

CRAIG GOLDBLATT
Counsel of Record
ANDREW J. CURRIE
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amicus Curiae NACBA

11 pp

QUESTION PRESENTED

Does Section 330(a)(1) of Title 11, United States Code (the "Bankruptcy Code") authorize a court to award fees to a debtor's attorney?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. THE PETITION SHOULD BE GRANTED TO RESOLVE AN OPEN, ACKNOWLEDGED, AND MATURE SPLIT IN THE CIRCUITS. 2

II. THE QUESTION PRESENTED HAS IMPORTANT PRACTICAL IMPLICATIONS. 4

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Page

In re American Steel Products, Inc., 197 F.3d 1354 (11th Cir. 1999) 3
In re Ames Department Stores, Inc., 76 F.3d 66 (2d Cir. 1996) 2
In re Bottone, 226 B.R. 290 (Bankr. D. Mass. 1998) 3
In re Brierwood Manor, Inc., 239 B.R. 709 (Bankr. D.N.J. 1999) 3
In re Century Cleaning Services, Inc., 195 F.3d 1053 (9th Cir. 1999) 2
In re Eggleston Works Loudspeaker Co., 253 B.R. 519 (6th Cir. B.A.P. 2000) 3
In re Fassinger, 191 B.R. 864 (Bankr. D. Or. 1996) 3
In re Freidland, 182 B.R. 576 (Bankr. D. Colo. 1995) 3
In re Johnson, 234 B.R. 671 (Bankr. S.D. Tex. 1999) 3
In re Keller Financial Services of Florida, Inc., 243 B.R. 806 (Bankr. M.D. Fla. 1999) 3
In re Kinnemore, 181 B.R. 520 (Bankr. D. Idaho 1995) 3
In re Melp, Ltd., 179 B.R. 636 (E.D. Mo. 1995) 3
In re Miller, 211 B.R. 399 (Bankr. D. Kan. 1997) 3
In re Pro-Snax Distributors, Inc., 157 F.3d 414 (5th Cir. 1998) 3
In re Ramey, 266 B.R. 857 (Bankr. S.D. Iowa 2001) 3
In re Skinner, 240 B.R. 225 (Bankr. W.D. Va. 1999) 3
In re Smith, 305 F.3d 1078 (9th Cir. 2002) 2
In re Stroudsburg Dyeing & Finishing Co., 209 B.R. 648 (Bankr. M.D. Pa. 1997) 3
In re Taylor, 250 B.R. 869 (E.D. Va. 2000) 3
In re Thomas, 195 B.R. 18 (Bankr. W.D.N.Y. 1996) 3
In re Top Grade Sausage, Inc., 227 F.3d 123 (3d Cir. 2000) 2
Kawaauhau v. Geiger, 523 U.S. 57 (1998) 2

TABLE OF AUTHORITIES—Continued

STATUTES

Page

11 U.S.C. § 330 5
11 U.S.C. § 521 4
11 U.S.C. § 704 4
11 U.S.C. § 1104 5
11 U.S.C. § 1107 5

IN THE

Supreme Court of the United States

No. 02-693

JOHN M. LAMIE,

Petitioner,

v.

UNITED STATES TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS

This brief is filed on behalf of the National Association of Consumer Bankruptcy Attorneys as amicus curiae in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys ("NACBA"), incorporated in 1992, is a non-profit organization of more than 1,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases

[1] Letters of consent from both parties have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation and submission of this brief.

filed each year, a significant portion of the over 1.5 million bankruptcy filings each year. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot be addressed adequately by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in this Court and numerous courts of appeal seeking to protect the rights of consumer bankruptcy debtors. *See Kawaauhau v. Geiger*, 523 U.S. 57 (1998).

ARGUMENT

The court of appeals held that Section 330(a)(1) of the Bankruptcy Code did not authorize a court to award fees to a debtor's attorney. The decision exacerbated a pre-existing circuit split on this question. This Court should grant certiorari to resolve the open and mature circuit split on this issue, which is of significant practical importance.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE AN OPEN, ACKNOWLEDGED, AND MATURE SPLIT IN THE CIRCUITS.

The decision below widens an open, acknowledged and mature split in the courts of appeals. The Third and Ninth Circuits have held that a bankruptcy court may award compensation to debtors' attorneys, notwithstanding the fact that the words "or the debtor's attorney" appear to have been inadvertently omitted from the text of Section 330(a) of the Bankruptcy Code. *In re Top Grade Sausage, Inc.*, 227 F.3d 123, 127-30 (3d Cir. 2000); *In re Smith*, 305 F.3d 1078, 1086-88 (9th Cir. 2002); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1057-61 (9th Cir. 1999). The Second Circuit, in dicta, has agreed. *In re Ames Dep't Stores, Inc.*, 76 F.3d 66, 71-72 (2d Cir. 1996).

In contrast, the Fourth Circuit below held that counsel for the debtor may not be compensated out of the bankruptcy estate for services provided during the bankruptcy.

In so holding, the Fourth Circuit followed decisions of the Fifth and Eleventh Circuits, *In re Am. Steel Prods., Inc.*, 197 F.3d 1354, 1355-56 (11th Cir. 1999); and *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414, 424-26 (5th Cir. 1998). As the Fourth Circuit acknowledged, its decision "widens the split on this issue with three other circuits." (Pet. App. 2a.)

Only this Court can resolve the conflict among the circuits on the question of whether Section 330(a)(1) of the Bankruptcy Code authorizes a court to award fees to debtors' attorneys. Both the majority and dissenting opinions observed that the decision below creates a 3-2 circuit split on the question presented. As Judge Michael noted in dissent below, there are two "sides" on the question presented (Pet. App. 13a), each of which has been "well developed" in thoughtful opinions of the courts of appeals—not to mention the numerous opinions of the bankruptcy and district courts on this issue.[2] This Court should grant certiorari to resolve the irreconcilable circuit split.

---

[2] Following the Third and Ninth Circuits approach: *In re Eggleston Works Loudspeaker Co.*, 253 B.R. 519, 524 (6th Cir. B.A.P. 2000); *In re Bottone*, 226 B.R. 290, 297 (Bankr. D. Mass. 1998); *In re Miller*, 211 B.R. 399, 400-02 (Bankr. D. Kan. 1997); *In re Melp, Ltd.*, 179 B.R. 636, 639 (E.D. Mo. 1995); *In re Taylor*, 250 B.R. 869, 870-71 (E.D. Va. 2000); *In re Brierwood Manor, Inc.*, 239 B.R. 709, 715-16 (Bankr. D.N.J. 1999); *In re Stroudsburg Dyeing & Finishing Co.*, 209 B.R. 648, 650 (Bankr. M.D. Pa. 1997).

Following the Fourth, Fifth, and Eleventh Circuit approach: *In re Ramey*, 266 B.R. 857 (Bankr. S.D. Iowa 2001); *In re Redding*, 242 B.R. 468 (Bankr. W.D. Mo. 1999); *In re Thomas*, 195 B.R. 18 (Bankr. W.D.N.Y. 1996); *In re Freidland*, 182 B.R. 576, 578-79 (Bankr. D. Colo. 1995); *In re Kinnemore*, 181 B.R. 520, 521 (Bankr. D. Idaho 1995); *In re Skinner*, 240 B.R. 225, 227-28 (Bankr. W.D. Va. 1999); *In re Johnson*, 234 B.R. 671, 674-75 (Bankr. S.D. Tex. 1999); *In re Keller Fin. Servs. of Florida, Inc.*, 243 B.R. 806, 817 (Bankr. M.D. Fla. 1999); *In re Fassinger*, 191 B.R. 864, 865 (Bankr. D. Or. 1996).

II. THE QUESTION PRESENTED HAS IMPORTANT PRACTICAL IMPLICATIONS.

The question presented has significant and wide-ranging implications for debtors and their professionals in bankruptcy cases. In a typical Chapter 7 case—whether filed by an individual or a business—a trustee is appointed to administer and oversee the wind-down and liquidation of the bankruptcy estate for the benefit of all creditors. To accomplish an expedient liquidation, Congress imposed certain duties on both the debtor and the trustee.

Section 704 of the Bankruptcy Code provides that:

> The trustee shall—(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interest of parties in interest; (2) be accountable for all property received . . . (4) investigate the financial affairs of the debtor . . . (8) if the business of the debtor is authorized to be operated, file . . . periodic reports and summaries of the operation of such business . . . .

11 U.S.C. § 704.

Moreover, the debtor has an express statutory obligation to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title . . . surrender to the trustee all property of the estate and any recorded information, including books, documents, records and papers, relating to property of the estate . . . ." *Id.* § 521(3) and (4).

The debtor's assistance and cooperation with the trustee is often quite important to the success of the bankruptcy case and the recovery that creditors will receive on account of their claims. For example, in cases in which a small business seeks protection under Chapter 7, it is commonly the case that the most valuable asset of the bankruptcy estate will be business receivables or other causes of action the estate holds against third parties. Counsel for the debtor, who will often have gained an in depth understanding of the debtor's business in the course of preparing the bankruptcy

filing, may be in the best position to assist the trustee in identifying and pursuing these claims.

In addition, in individual debtor cases, many debtors will lack the skills and financial literacy to satisfy effectively their statutory obligations to cooperate with the trustee without the assistance of counsel. Accordingly, it is commonly the case that debtor's counsel will play an essential role in providing these necessary services during the bankruptcy.

The decision below, following the decisions of the Fifth and Eleventh Circuits, holds that debtor's counsel cannot be compensated in bankruptcy for any of this work. By contrast, in the Third and Ninth Circuits, counsel for the debtor may be compensated out of the bankruptcy estate for these services, assuming counsel can otherwise establish that the fees were "reasonable" and the services provided were "actual [and] necessary." *Id.* § 330(a)(1).

As a result of the circuit split on this question, counsel for a debtor in the Fourth, Fifth and the Eleventh Circuits may be disinclined to provide such assistance, whereas debtor's counsel in the Third and Ninth Circuits may be more willing to do so. To address this concern, debtors' counsel in those jurisdictions that refuse to permit post-bankruptcy compensation for actual and necessary services may demand a prepayment or retainer, prior to the bankruptcy, for the work that they anticipate being called upon to perform post-bankruptcy.

The practical consequences are further exacerbated in cases in which a bankruptcy, originally filed under Chapter 11, is later converted to Chapter 7 (*see id.* § 1112(a)), or in which the debtor-in-possession is replaced by the appointment of a Chapter 11 trustee (*see id.* § 1104). In these cases, during the time in which the debtor remains a debtor-in-possession (before the conversion or appointment of a trustee), the debtor has the duties of a trustee, *id.* § 1107, and debtor's counsel may be compensated under Section 330(a) as counsel to the "trustee." The decision below, however, would deprive debtor's counsel of any compensation for

work performed after conversion or the appointment of a trustee. This problem can arise in a variety of cases: small businesses, operating businesses cases or consumer filings. Especially in a complex business case, there is often extensive work that is required of debtor's counsel in the transition period, as the trustee comes to take control of the business. To deprive debtor's counsel of compensation for that work would be quite disruptive to the orderly transition that would best serve the interests of all creditors. Given the sheer volume of bankruptcy filings, this is a matter of tremendous practical importance.

There is no reason to believe that Congress intended such a result. In addition to the many statutory anomalies highlighted in the petition (such as the nonsense the court of appeals' construction would make of Sections 329 and 331—as well as the other provisions of Section 330), the decision below cannot be harmonized with any sound principle of bankruptcy policy. Because of the pernicious real world effect of the acknowledged circuit split on this issue, it is imperative that this Court grant certiorari to resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CRAIG GOLDBLATT
Counsel of Record
ANDREW J. CURRIE
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amicus Curiae NACBA

FEBRUARY 2003

No. 02-693

IN THE

Supreme Court of the United States

JOHN M. LAMIE,

Petitioner,

v.

UNITED STATES TRUSTEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

RHEBA RUTKOWSKI
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

G. ERIC BRUNSTAD, JR.
Counsel of Record
P.O. Box 208215
127 Wall Street
New Haven, CT 06520
(860) 240-2717

Attorneys for Amicus Curiae
G. Eric Brunstad, Jr.

178993

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

21 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of the *Amicus*	1
Statement	2
Summary of Argument	3
Argument	5
A. Certiorari Is Warranted Because The Decision Below Widens The Conflict Among The Courts Of Appeals Concerning The Proper Interpretation Of Section 330(a) And Contravenes The Text, History, And Policy Of The Bankruptcy Code.	5
B. Certiorari Is Warranted Because Resolution Of The Interpretive Dispute In the Lower Courts Is Vital To The Administration Of The Bankruptcy Code.	11
Conclusion	13

TABLE OF CITED AUTHORITIES

FEDERAL CASES

	Page
In re Ames Dep't Stores, 76 F.3d 66 (2d Cir. 1996) ..	3
Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro Snax Distribs., Inc.), 157 F.3d 414 (5th Cir. 1998)	2
In re Bottone, 226 B.R. 290, 297 (Bankr. D. Mass. 1998)	3
In re Brierwood Manor, Inc., 239 B.R. 709 (Bankr. D.N.J. 1999)	3
Dewsnup v. Timm, 502 U.S. 410 (1992)	10
Duparquet Huot & Moneuse Co. v. Evans, 297 U.S. 216 (1936)	10
In re Fassinger, 191 B.R. 864 (Bankr. D. Or. 1996)	2-3
In re Friedland, 182 B.R. 576 (Bankr. D. Colo. 1995)	3
Friedman v. Melp, Ltd. (In re Melp Ltd.), 179 B.R. 636 (E.D. Mo. 1995)	3
Ingelsby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re American Steel Prod. Inc.), 197 F.3d 1354 (11th Cir.1999)	2

Cited Authorities

	Page
In re Johnson, 234 B.R. 671 (Bankr. S.D. Tex. 1999)	2
In re Keller Fin. Servs., of Florida, Inc., 243 B.R. 806 (Bankr. M.D. Fla. 1999)	3
Kelly v. Robinson, 479 U.S. 36 (1986)	9
In re Kinnemore, 181 B.R. 520 (Bankr. D. Idaho 1995)	3
Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494 (1986)	10
In re Miller, 211 B.R. 399 (Bankr. D. Kan. 1997) ...	3
In re Pontiac Hotel Assocs., 92 B.R. 715 (E.D. Mich. 1988)	7
In re Ramey, 266 B.R. 857 (Bankr. S.D. Iowa 2001)	2
In re Skinner, 240 B.R. 225 (Bankr. W.D. Va. 1999)	2
In re Stroudsburg Dyeing & Finishing Co., 209 B.R. 648 (Bankr. M.D. Pa. 1997)	3
In re Thomas, 195 B.R. 18 (Bankr. W.D.N.Y. 1996)	2-3

Cited Authorities

	Page
In re Top Grade Sausage, Inc., 227 F.3d 123 (3d Cir. 2000)	3, 9
Towarnicky v. Peyton (In re Taylor), 250 B.R. 869 (E.D. Va. 2000)	3
In re UNR Indus., Inc., 986 F.2d 207 (7th Cir. 1993)	6, 7
United Savs. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988)	8
United States Trustee v. Eggleston Works Loudspeaker Co. (In re Eggleston Works Loudspeaker Co.), 253 B.R. 519 (BAP 6th Cir. 2000)	3
United States Trustee v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.), 195 F.3d 1053 (9th Cir. 1999)	3
United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989)	8, 10

Cited Authorities

	Page
FEDERAL STATUTES	
11 U.S.C. § 330	6, 7
11 U.S.C. § 330(a)	1, 4, 5, 6, 8, 9
11 U.S.C. § 330(a)(1)	8, 9
11 U.S.C. § 330(a)(1)(A)	9
11 U.S.C. § 330(a)(3)(A)	8
11 U.S.C. § 330(a)(4)(B)	9
11 U.S.C. § 331	8
11 U.S.C. § 343	5
11 U.S.C. § 521	5
11 U.S.C. § 541	5
11 U.S.C. § 1107	5
28 U.S.C. § 1408	4, 11

Page

OTHER AUTHORITIES

Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 18 Am. Bankr. Inst. J. 20, 21 (June 1999) 12

Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 Bankr. Dev. J. 201 (2001) 9, 12

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Part II, 93rd Cong., 1st Sess. 75, 79 (1973) 7

Report of the Commission on the Bankruptcy Laws of the United States, H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977) 7

U.S. Bankruptcy Courts- Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12 Month Period Ending June 30, 2002, Table F-2 (Office of Human Res. & Statistics June 2002), at http://www.uscourts.gov/judiciary2002/contents.html 11

Page

TREATISES

Collier on Bankruptcy, ¶ 330.LH[3] (15th ed. rev. 2001) 6

Collier on Bankruptcy, ¶ 330.LH[4] (15th ed. rev. 2001) 6

Collier on Bankruptcy, ¶ 330.LH[5] (15th ed. rev. 2001) 10

INTEREST OF THE *AMICUS*

Amicus curiae G. Eric Brunstad, Jr. respectfully submits this brief in support of the Petition for a Writ of Certiorari. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief.[1]

The undersigned *amicus* is a Visiting Lecturer of Law at the Yale Law School, where he teaches courses on bankruptcy law, business reorganizations, and secured transactions. He has taught at Yale since 1992, and also has taught at the Harvard Law School.

In addition to teaching, the undersigned is the current Vice-Chair of the ABA Business Bankruptcy Committee. He is also a partner with the law firm of Bingham McCutchen LLP, practicing in the area of bankruptcy law and bankruptcy appeals. He is a contributing author to the Collier treatise on bankruptcy law and is responsible for multiple chapters of the treatise. He has argued before the Court, and has participated in several other bankruptcy cases in the Court.

The undersigned has studied and published articles on a variety of bankruptcy topics and is interested in the administration of bankruptcy law. The basic perspective of the undersigned is that it is vital to the equitable and efficient administration of bankruptcy law that the Court resolve the dispute in the lower courts concerning the proper interpretation of 11 U.S.C. § 330(a) and to construe the statute

---

1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. The consents of the parties are being sent under separate cover.

in a manner that recognizes the critical importance of debtors' counsel in Chapter 7 and Chapter 11 bankruptcy proceedings. Consistent with Supreme Court Rule 37.1, the purpose of this brief is to bring to the Court's attention issues that other parties do not address.

STATEMENT

Petitioner John M. Lamie served as the attorney for the bankrupt debtor in this matter. Although the debtor's bankruptcy case began as a reorganization proceeding under Chapter 11 of the Bankruptcy Code, the matter was eventually converted to a liquidation proceeding under Chapter 7. Petitioner received compensation for his services rendered during the Chapter 11 phase, but was denied compensation for his services performed after the conversion to Chapter 7. The Fourth Circuit justified this result on its belief that, following its amendment in 1994, section 330(a) of the Bankruptcy Code no longer authorizes compensation for debtor's counsel in Chapter 7 proceedings.

In so holding, the Fourth Circuit followed the decisions of the Fifth and Eleventh Circuits. *See Ingelsby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re American Steel Prod. Inc.)*, 197 F.3d 1354, 1355-57 (11th Cir.1999); *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro Snax Distribs., Inc.)*, 157 F.3d 414, 424-26 (5th Cir. 1998).[2]

---

2. *See also In re Ramey*, 266 B.R. 857 (Bankr. S.D. Iowa 2001); *In re Skinner*, 240 B.R. 225 (Bankr. W.D. Va. 1999); *In re Keller Fin. Servs., Inc.*, 243 B.R. 806, 817 (Bankr. M.D. Fla. 1999); *In re Johnson*, 234 B.R. 671 (Bankr. S.D. Tex. 1999); *In re Thomas*, 195 B.R. 18 (Bankr. W.D.N.Y. 1996); *In re Fassinger*, 191 B.R. 864, 865 (Cont'd)

The decision below, however, conflicts squarely with the holdings of the Third and Ninth Circuits, *see In re Top Grade Sausage, Inc.*, 227 F.3d 123, 127-30 (3d Cir. 2000); *United States Trustee v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.)*, 195 F.3d 1053, 1057-61 (9th Cir. 1999), with which the Second Circuit is "inclined to agree," *see In re Ames Dep't Stores*, 76 F.3d 66, 71-72 (2d Cir. 1996).[3]

SUMMARY OF ARGUMENT

The Fourth Circuit's ruling in this case deepens an acknowledged conflict among the Courts of Appeals and imperils the orderly administration of the Nation's bankruptcy laws. Like most other court proceedings, the successful administration of bankruptcy cases depends in large measure on the participation of skilled counsel to represent the parties involved, including the debtor. For well over a century, bankruptcy law has provided for the payment of the fees of debtor's counsel out of the assets of the debtor's bankruptcy estate because there is generally no other available source for the payment of these fees.

(Cont'd)
(Bankr. D. Or. 1996); *In re Friedland*, 182 B.R. 576, 578-79 (Bankr. D. Colo. 1995); *In re Kinnemore*, 181 B.R. 520, 521 (Bankr. D. Idaho 1995).

3. *See also United States Trustee v. Eggleston Works Loudspeaker Co. (In re Eggleston Works Loudspeaker Co.)*, 253 B.R. 519, 524 (BAP 6th Cir. 2000); *In re Taylor*, 250 B.R. 869, 870-71 (E.D. Va. 2000); *In re Brierwood Manor, Inc.*, 239 B.R. 709 (Bankr. D.N.J. 1999); *In re Bottone*, 226 B.R. 290, 297 (Bankr. D. Mass. 1998); *In re Miller*, 211 B.R. 399, 400-02 (Bankr. D. Kan. 1997); *In re Stroudsburg Dyeing & Finishing Co.*, 209 B.R. 648, 650 (Bankr. M.D. Pa. 1997); *In re Melp Ltd.*, 179 B.R. 636, 639 (E.D. Mo. 1995).

It cannot reasonably be expected that counsel will accept debtor representations in the Fourth, Fifth, and Eleventh Circuits, where their ability to be paid stands in doubt. Debtors in the Second, Third, and Ninth Circuits, however, suffer from no such impediment. For many insolvent debtors, the Bankruptcy Code's liberal venue provisions offer a choice of where to commence a Chapter 11 or Chapter 7 case. *See* 28 U.S.C. § 1408. Understandably, debtors with a choice will flock to the jurisdictions where their counsel can be paid. The split among the circuits thus promotes the unseemly spectacle of debtor forum shopping for fee-favorable venues. This unfortunate state of affairs should be corrected. Nothing in the Bankruptcy Code directs the categorical denial of compensation to debtor's counsel in Chapter 7 cases. On the contrary, the Fourth Circuit's interpretation of section 330(a) renders the statute inconsistent with other provisions of the Code that expressly provide for the payment of the debtor's attorney.

Moreover, the decision below is fundamentally inconsistent with the Code's purpose and policy. When Congress enacted the Code in 1978, it specifically sought, among other things, to promote the goal of "open access," making bankruptcy relief — including relief under Chapter 7 — widely available. The Fourth's Circuit's decision clearly conflicts with this policy, as denying compensation to the debtor's attorney can only have the effect of restricting access to otherwise-available relief.

One would expect that, if Congress had truly intended to overturn the longstanding practice of compensating debtor's counsel out of the assets of the debtor's estate, and likewise undermine its own policies in enacting the Code, some discussion of this intention would appear in the

legislative record. No such discussion, however, appears in any of the legislative materials. The Fourth Circuit based its decision to deny Petitioner compensation for his Chapter 7 services on the deletion in 1994 of certain language in section 330(a), which omission appears to be nothing more than an inadvertent scrivener's error. For these reasons, the Court should grant a writ of certiorari to review the decision of the Fourth Circuit in this case.

ARGUMENT

A. Certiorari Is Warranted Because The Decision Below Widens The Conflict Among The Courts Of Appeals Concerning The Proper Interpretation Of Section 330(a) And Contravenes The Text, History, And Policy Of The Bankruptcy Code.

When a debtor files for relief under Chapters 7 or 11 of the Bankruptcy Code, section 541 provides for the automatic creation of a bankruptcy estate consisting of all of the debtor's assets, wherever located and by whomever held. *See* 11 U.S.C. § 541. At the same time, the Bankruptcy Code imposes upon the debtor numerous duties and obligations, including the preparation of schedules; attendance at examinations and meetings; and participation in potentially protracted court hearings. *See, e.g.*, 11 U.S.C. §§ 343, 521. In Chapter 11 cases, the debtor bears additional responsibilities. *See, e.g.*, 11 U.S.C. § 1107. Quite clearly, the debtor will often require the assistance of counsel in order to participate in the process and for the system to work properly. Yet, by operation of section 541, the Bankruptcy Code effectively strips the debtor of ownership of the very assets that might be used to pay for this representation and vests these assets in the bankruptcy estate.

Not surprisingly, when Congress enacted the Bankruptcy Code in 1978, it continued the practice under the former Bankruptcy Act of 1898 of providing for the payment of the fees of debtor's counsel out of the assets of the estate. As originally enacted, section 330(a) expressly authorized the bankruptcy court to award reasonable compensation "to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*. . . ." 11 U.S.C. § 330(a) (1994) (emphasis supplied).

The enactment of section 330 in 1978 reflected an intentional liberalization of the award of attorneys' fees in bankruptcy cases in favor of attracting skilled representation to enhance the administration of bankruptcy proceedings. *See* Collier on Bankruptcy ("*Collier*"), ¶ 330.LH[4] (15th ed. rev. 2001). Under the former Bankruptcy Act, compensation to debtors' attorneys was superintended under a standard of "strictest economy" to conserve the bankruptcy estate and maximize the return to creditors. *Id.*, ¶ 330.LH[3]; *see In re UNR Indus., Inc.*, 986 F.2d 207, 208 (7th Cir. 1993). In enacting section 330, Congress abandoned this approach, making it plain that "[n]otions of economy of the estate in fixing fees are outdated and have no place in the bankruptcy code." *Collier*, ¶ 330.LH[4] & nn.5, 6 (citing legislative history and cases). Section 330 was intended to ensure that "[a]ttorneys and other professionals serving in a bankruptcy case are . . . compensated at the same rate that would be used to compensate them for performing comparable services in nonbankruptcy cases." *Collier*, ¶ 330.LH[4]. As explained by one court, section 330(a), as originally enacted, "was designed to ensure that bankruptcy counsel would command fees comparable to non-bankruptcy counsel, and thus that competent professionals would be attracted to the

bankruptcy field." *In re Pontiac Hotel Assocs.*, 92 B.R. 715, 716 (E.D. Mich. 1988) (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 329-30 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787). *See In re UNR Indus.*, 986 F.2d at 209 (in enacting section 330, "Congress expressed its intent that compensation in bankruptcy matters be commensurate with the fees awarded for comparable services in non-bankruptcy cases") (citing 11 U.S.C. § 330; H.R. Rep. No. 595, 95th Cong., 2d Sess. 329-30, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286).

This intent plainly mirrors a "principal goal" of the Bankruptcy Code to provide "open access" to bankruptcy relief. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Part II, 93rd Cong., 1st Sess. 75, 79 (1973); H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977). The rationale behind this policy is to offer access to bankruptcy relief that is as open as "access to the credit economy." *Id.* at 75. Obviously, denying compensation to debtors' attorneys would contravene this policy by reducing the availability of skilled counsel to guide the debtor through the complexities of the bankruptcy process.

The Fourth Circuit premised its conclusion in the decision below – namely that section 330(a) no longer authorizes an award of compensation for debtor's counsel in Chapter 7 cases — on the deletion in 1994 of the phrase "*or to the debtor's attorney*" at the end of the first of two lists of persons authorized to receive compensation contained in the section. The available evidence demonstrates, however, that this deletion was merely a scrivener's error, and that Congress harbored no intent to eliminate compensation for debtor's counsel in Chapter 7 cases.

As this Court has noted, Congress adopted the original Bankruptcy Code in 1978 after ten years of study. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989). By design, the Code was intended to function as a coherent regulatory scheme. Recognizing this, the Court has directed that its interpretation is properly a "holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Significantly, like the original text of section 330(a), other provisions of the Code still reference and provide for the payment of debtor's counsel in bankruptcy proceedings. These provisions include section 331, which specifically allows payment of interim compensation to debtor's counsel during the course of a bankruptcy case. *See* 11 U.S.C. § 331. In amending the Code in 1994, Congress left this and similar provisions untouched. If Congress had truly intended to revise the Code's compensation provisions to foreclose debtors' attorneys from receiving payment for their services in Chapter 7 cases, one would expect a more comprehensive alteration of the entire compensation scheme, and not one that leaves unaltered the authorization for interim compensation.

Moreover, the 1994 amendments introduced numerous inconsistencies and grammatical errors to the text of section 330, further undermining any inference of a deliberate intention to eliminate compensation for debtor's counsel. For example, following its amendment in 1994, the section now contains two subsections denominated as 330(a)(3)(A). In addition, although the first part of section 330(a)(1) currently omits reference to "the debtor's attorney," another part of the same subsection retains the reference to the "attorney" that formerly referred clearly and exclusively to

the now deleted "debtor's attorney" in the original provision. *See* 11 U.S.C. § 330(a)(1)(A). Indeed, unless the retained reference to "attorney" in section 330(a)(1)(A) refers to the omitted "debtor's attorney" in former section 330(a)(1), it is meaningless.

Similarly, section 330(a) expressly authorizes compensation for debtors' attorneys in proceedings under Chapters 12 and 13. *See* 11 U.S.C. § 330(a)(4)(B). There is no discernible reason, however, why Congress would permit compensation to debtors' attorneys in proceedings under Chapters 12 and 13, yet deny it in Chapter 7 cases. Moreover, as amended, section 330(a)(1) is missing the conjunction "or" in the list of persons entitled to receive compensation, suggesting further that the deletion of the phrase "or the debtor's attorney" was inadvertent. *See* 11 U.S.C. § 330(a)(1) (stating that "the court may award to a trustee, an examiner, [*sic*] a professional person"). *See generally* Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 Bankr. Dev. J. 201, 211-213 & nn.80-108 (2001) (summarizing errors and inconsistencies noted by courts; particularly the Third and Ninth Circuits in the *In re Top Grade Sausage* and *In re Century Cleaning* cases).

These and other difficulties with section 330(a)(1) demonstrate uncertainty as to its construction. To resolve its several ambiguities, the provision should be interpreted in accordance with its history, policy, and purpose, as well as consistently with other provisions of the Code. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986) ("[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (citations and internal quotation marks

omitted); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) ("To fix the meaning of these provisions [of the Bankruptcy Act] there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."). This is especially so given the magnitude of the change resulting from the Fourth Circuit's interpretation.

As this Court has stated, "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (citing *Emil v. Hanley*, 318 U.S. 515, 521 (1943)). As the Court has further explained, it has been especially reluctant to interpret the Bankruptcy Code to effect sweeping change that has not been "the subject of at least some discussion in the legislative history." *Dewsnup*, 502 U.S. at 419 (citing *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990); *Ron Pair Enters.*, 489 U.S. at 244-245; *United Savings Ass'n of Texas*, 484 U.S. at 380); *see Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 495 (1986).

"Of course, where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup*, 502 U.S. at 419-20. But in this case, the ambiguities, inconsistencies, and incoherence of the statutory text, coupled with the absence of any meaningful discussion of the relevant deletion in the legislative record, caution against abandoning the section's historic interpretation. *See Collier*, ¶ 330.LH[5] ("[S]ection 330(a)(1) of the Code deletes the reference to 'the debtor's attorney' as a party who may be allowed compensation. Clearly this result was unintended. . . . [It] would represent a fundamental change in the law. . . . Because the change is inconsistent with current case law and the

legislative history of section 330 does not support such a drastic change, courts should construe the deletion as unintended.")

B. Certiorari Is Warranted Because Resolution Of The Interpretive Dispute In the Lower Courts Is Vital To The Administration Of The Bankruptcy Code.

Certiorari is further warranted because of the significance of the issue in the larger administration of bankruptcy proceedings. The controversy in this case affects potentially every Chapter 7 case, and every Chapter 11 proceeding that is converted to a Chapter 7 case, as happened here. It has been reported that, in the year ending June 30, 2002, 1,053,230 Chapter 7 cases and 11,401 Chapter 11 cases were filed nationwide. *See* U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12 Month Period Ending June 30, 2002, Table F-2 (Office of Human Res. & Statistics June 2002), at http://www.uscourts.gov/judiciary2002/contents.html. As a matter of law, equity, and efficiency, the debtors who file these cases need and are entitled to representation.

The current split of authority among the Courts of Appeals over the proper interpretation of section 330 unavoidably distorts the administration of bankruptcy proceedings. In general, under 28 U.S.C. § 1408, a debtor may commence a bankruptcy case in any venue in which the debtor has a domicile, residence, principal place of business, or property. Given the ease with which a debtor may qualify for venue in any particular district under this provision, the current conflict among the circuits on the issue of

compensation for the debtor's attorney creates a powerful incentive for debtors to select venues where their counsel may be paid. The incentive for forum shopping is unseemly, and should be corrected.

Moreover, the Fourth Circuit's interpretation of section 330(a) jeopardizes the equitable and efficient administration of bankruptcy cases. The prospect of receiving no compensation "may have the effect of denial of counsel, or at the very least, lead to debtors representing themselves. This possibility may lead to increased errors and time spent to correct those errors, thereby further extending the time necessary to adjudicate all parts of the case." Minias, 18 BANK. DEV. J. at 225-26. Moreover, the attorneys who do not leave the bankruptcy arena entirely may find themselves often "working for free," either because the bankruptcy court refuses to allow them to withdraw or because "state law ethical obligations may require an attorney to continue to perform as counsel, regardless of the potential prohibition of payment." Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 18 Am. Bankr. Inst. J. 20, 21 (June 1999).

If Congress had intended such a drastic departure from existing law and practice, surely it would have discussed it somewhere. Because there is no indication that Congress intended this result, the current conflict among the Courts of Appeals should be resolved consistent with the efficient and fair administration of bankruptcy relief.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

RHEBA RUTKOWSKI
BINGHAM MCCUTCHEN LLP
150 Federal Street
Boston, MA 02110
(617) 951-8000

G. ERIC BRUNSTAD, JR.
Counsel of Record
P.O. Box 208215
127 Wall Street
New Haven, CT 06520
(860) 240-2717

Attorneys for Amicus Curiae
G. Eric Brunstad, Jr.

Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

No. 02-693

IN THE

Supreme Court of the United States

John M. Lamie,

Petitioner,

v.

United States Trustee.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR THE PETITIONER

John M. Lamie
BROWNING, LAMIE & GIFFORD, P.C.
P.O. Box 519
Abingdon, VA 24212

Additional counsel listed on inside cover

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

May 30, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

90 pp

Additional counsel:

G. Eric Brunstad, Jr.
P.O. Box 208215
127 Wall St.
New Haven, CT 06520

John A. E. Pottow
Assistant Professor of Law
University of Michigan Law School
625 South State St.
Ann Arbor, MI 48109

Craig Goldblatt
Andrew Currie
WILMER, CUTLER & PICKERING
2445 M St., NW
Washington, DC 20037

QUESTION PRESENTED

Does 11 U.S.C. 330(a)(1) authorize a court to award fees to a debtor's attorney?

PARTIES TO THE PROCEEDINGS BELOW

In the court of appeals, this matter was captioned *United States Trustee* v. *Equipment Services (In re Equipment Services)*. Equipment Services is a debtor represented by John M. Lamie. Because the issue in this Court is Lamie's right to attorney's fees, and because the United States Trustee objected to the fee award in the proceedings below, they are respectively denominated the petitioner and the respondent in this Court. Equipment Services was identified as a nominal party by the Petition for Certiorari.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
BRIEF FOR THE PETITIONER 1
OPINIONS BELOW AND JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT 1
SUMMARY OF THE ARGUMENT 13
ARGUMENT 16
I. Section 330(a) Contains a Scrivener's Error that Requires the Court To Consider the Text, Purpose, and History of the Statute and the Code as a Whole To Determine Its Meaning 16
II. The Decision Below Conflicts with the Text and Structure of Section 330(a) and Other Provisions of the Bankruptcy Code 20
A. The better reading of the text of Section 330(a) is that Congress did not intend to eliminate the authority to compensate debtors' attorneys 20
B. The Fourth Circuit's holding that Congress intended in the 1994 Act to prohibit bankruptcy courts from compensating counsel with funds of the debtor's estate cannot be reconciled with two provisions that Congress added to Section 330(a) at that time. 22
III. The Circumstances Surrounding the 1994 Recodification of Section 330(a) Refute the Claim that Congress Intended To Eliminate the Authority To Compensate Counsel. 25

IV. The Fourth Circuit's Decision Conflicts with Basic Bankruptcy Policies and Produces an Absurd Result.....30
V. Congress Would Not Have So Profoundly Changed Prior Bankruptcy Practice Without Any Acknowledgement in the Statutory History. 36
CONCLUSION.....42

TABLE OF AUTHORITIES

Cases

Burns v. *United States*, 501 U.S. 129 (1991) 20
CFTC v. *Weintraub*, 471 U.S. 343 (1985) 1
Chevron U.S.A. v. *Echazabal*, 536 U.S. 73 (2002).....20
Cohen v. *de la Cruz*, 523 U.S. 213 (1998) 36, 37
Conrad, Rubin & Lesser v. *Pender*, 289 U.S. 472 (1933) 40
Dewsnup v. *Timm*, 502 U.S. 410 (1992) 36
Edwards v. *Kearzey*, 96 U.S. 595 (1877).....38
Ford v. *United States*, 273 U.S. 593 (1927).....20
Gustafson v. *Alloyd Co.*, 513 U.S. 561 (1995) 22
In re Century Cleaning Servs., 195 F.3d 1053 (CA9 1999).....28, 34
In re Craig, 265 B.R. 624 (Bankr. M.D. Fla. 2001) 36
In re Gies, 10 F. Cas. 339 (E.D. Mich. 1875).....39
In re Handell, 11 F. Cas. 420 (W.D. Tex. 1876).....39
In re Hasset, Ltd., 283 B.R. 376 (Bankr. E.D.N.Y. 2002).....1
In re Kross, 96 F. 816 (S.D.N.Y. 1899) 40
In re Lang, 127 F. 755 (W.D. Tex. 1904) 41
In re Pontiac Hotel Assocs., 92 B.R. 715 (E.D. Mich. 1988).....32
In re Taylor, 250 B.R. 869 (E.D. Va. 2000).....25
In re UNR Indus., Inc., 986 F.2d 207 (CA7 1993) 32
Indian Motorcycle Assocs. v. *Mass. Housing Finance*, 66 F.3d 1246 (CA1 1995).....12
J.B. Orcutt Co. v. *Green*, 204 U.S. 96, (1907) 38
Katchen v. *Landy*, 382 U.S. 323 (1966).....30
La. World Exposition v. *Federal Ins. Co.*, 858 F.2d 233 (CA5 1988) 1
Local Loan Co. v. *Hunt*, 292 U.S. 234 (1934) 2

Lorillard Tobacco Co. v. *Reilly*, 533 U.S. 525 (2001).....18
Louisville Joint Stock Land Bank v. *Radford*, 295 U.S. 555 (1935).....38
Pennsylvania Dep't of Public Welfare v. *Davenport*, 495 U.S. 552 (1990).....36
Randolph & Randolph v. *Scruggs*, 190 U.S. 533 (1903).....40
Solid Waste Agency v. United States Army Corps of Engineers, 531 U.S. 159 (2001)..... 29-30
Stellwagen v. *Clum*, 245 U.S. 605 (1918).....38
United Sav. Ass'n v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365 (1988).....18
United States v. *Morton*, 467 U.S. 822 (1984).....20
Wash. State Dep't of Soc. & Health Servs. v. *Guardianship Estate of Keffeler*, 123 S. Ct. 1017 (2003).....18

Statutes & Rules

11 U.S.C. 101(2).....27
11 U.S.C. 101(21B).....27
11 U.S.C. 101(3) (superseded).....27
11 U.S.C. 101(4).....27
11 U.S.C. 101(53C).....27
11 U.S.C. 101(53D).....27
11 U.S.C. 101(56A).....27
11 U.S.C. 327.....8, 32
11 U.S.C. 327(a).....8, 22, 32
11 U.S.C. 328(b).....32
11 U.S.C. 329(a).....3, 4
11 U.S.C. 329(b).....passim
11 U.S.C. 330.....passim
11 U.S.C. 330(a).....passim
11 U.S.C. 330(a)(4)(A)(ii)(I).....10, 35
11 U.S.C. 330(a)(1).....passim
11 U.S.C. 330(a)(1)(A).....4, 18

11 U.S.C. 330(a)(2).....3, 27
11 U.S.C. 330(a)(3)..... 4, 8, 12, 24, 34
11 U.S.C. 330(a)(3)(A).....27
11 U.S.C. 330(a)(4).....passim
11 U.S.C. 330(a)(4)(A).....23
11 U.S.C. 330(a)(4)(B).....23, 24
11 U.S.C. 330(a)(5).....14, 24
11 U.S.C. 330(a)(2)-(6).....18
11 U.S.C. 331.....22, 24, 25
11 U.S.C. 341.....2, 6, 30
11 U.S.C. 341(d).....6
11 U.S.C. 343.....30
11 U.S.C. 362(b)(14) (superseded).....27
11 U.S.C. 362(b)(17).....27
11 U.S.C. 365(c)(4).....27
11 U.S.C. 365(d)(5).....27
11 U.S.C. 365(d)(9).....27
11 U.S.C. 365(p) (superseded).....27
11 U.S.C. 503.....3, 18
11 U.S.C. 503(a).....3
11 U.S.C. 503(b)(1)(A).....3
11 U.S.C. 503(b)(2).....3
11 U.S.C. 507(a)(1).....3
11 U.S.C. 521.....30
11 U.S.C. 521(1).....1, 6
11 U.S.C. 521(3).....2, 6
11 U.S.C. 521(4).....2, 7
11 U.S.C. 522(f)(1)(B).....27
11 U.S.C. 522(f)(2) (superseded).....27
11 U.S.C. 522(g)(2).....27
11 U.S.C. 523.....27
11 U.S.C. 523(a).....27

11 U.S.C. 523(a)(15) 27
11 U.S.C. 541 2
11 U.S.C. 546(g) 27
11 U.S.C. 549 2
11 U.S.C. 553(b)(1) 27
11 U.S.C. 701(a) 5
11 U.S.C. 726(b) 27
11 U.S.C. 1107(a) 8, 22
11 U.S.C. 1202 34
11 U.S.C. 1302 34
Act of June 22, 1874, ch. 390, 18 Stat. 178 38
Act of June 7, 1934, ch. 424, 48 Stat. 911 39
Bankrupcty Act of 1926, Pub. L. No. 69-301, 44 Stat. 660 39
Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803) 37
Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843) 37
Bankruptcy Act of 1867, ch. 176, 14 Stat 517 (repealed 1878) 37, 38
Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 ..... 39, 40
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 18
Bankr. R. 1007(a) 30
Bankr. R. 1007(a)(1) 1
Bankr. R. 1007(b)(1) 1
Bankr. R. 2004 ..... 2, 30
Bankr. R. 4002 ..... 2, 30
S. Ct. R. 12.5 13

Other Authorities

124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978) 41
124 Cong. Rec. S17,406 (daily ed. Oct. 6, 1978) 41
140 Cong. Rec. H10,769 (daily ed. Oct. 4, 1994) 29

140 Cong. Rec. S14,597-02 (daily ed. Oct. 7, 1994) 29
140 Cong. Rec. S4741-01 (daily ed. Apr. 21, 1994) 27
2001 Year-End Totals for Filings Reach New High, The Bankruptcy Strategist, Apr. 2002 33
Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on Econ. & Commercial Law of the Comm. on the Judiciary, 103d Cong. (1994) 29
H.R. 120, 105th Cong. (1997) 29
H.R. 764, 105th Cong. (1997) 29
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 32
H.R. Rep. No. 835, 103d Cong., 2d Sess. (1994) 29
James Kent et al., *Bankrupt and Insolvent Laws, Report of the Incalculable Chancellor and Judges of the Supreme Court of the State of New York* (Jan. 22, 1819), *reprinted in* 16 Niles' Wkly. Reg. 85 (1819) 37
Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 Bankr. Dev. J. 201 (2001) 31
Model Rules of Professional Conduct Rule 1.16(b) 33
Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Part II, 93d Cong., 1st Sess. (1973) 32
S. 540, 103d Cong. (1993) 27
S. Rep. No. 168, 103d Cong., 1st Sess. (1993) 27
Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325 (1991) 38
Charles Warren, Bankruptcy in United States History (1935) 37
Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 1999 ABI J. LEXIS 79 (June 1999) 33

Treatises

Collier on Bankruptcy ¶ (15th ed. 2002).....passim
W. Homer Drake, Jr., Bankruptcy Practice for the General Practitioner (3d ed. 2002)..... 31-32
Norton Bankruptcy Law and Practice (2d ed. 1997 Supp.) 28

BRIEF FOR THE PETITIONER

OPINIONS BELOW AND JURISDICTION

The opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 290 F.3d 739. The opinions of the district court (Pet. App. 15a-27a) and bankruptcy court (*id.* 28a-44a) are unpublished. The court of appeals issued its opinion on May 31, 2002, and denied rehearing *en banc* on August 5, 2002. This Court granted certiorari on March 10, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced *infra* at 1a-5a.

STATEMENT

For more than a century, Congress has authorized bankruptcy courts to use funds of the bankruptcy estate to pay the fees of a debtor's attorney for services that benefit the estate. A divided panel of the Fourth Circuit in this case nonetheless inferred that Congress implicitly reversed course entirely, forbidding such compensation, when it revised and recodified Section 330(a) of the Bankruptcy Code in 1994. The court of appeals rejected the contrary rule endorsed by the leading treatise and adopted by "the majority of courts" (*In re Hasset, Ltd.*, 283 B.R. 376, 381 (Bankr. E.D.N.Y. 2002)), acknowledging that three circuits had reached the opposite conclusion.

1. The Bankruptcy Code imposes an array of duties on a debtor in bankruptcy. For example, the debtor must "file a list of creditors," together with "a schedule of assets and liabilities." 11 U.S.C. 521(1); Bankr. R. 1007(a)(1), (b)(1). The debtor must also take steps to "maximize the value of the estate." *La. World Exposition* v. *Federal Ins. Co.*, 858 F.2d 233, 246 (CA5 1988) (citing *CFTC* v. *Weintraub*, 471 U.S. 343, 352 (1985)). "In addition," whether the debtor is "in

possession" of the estate or instead a trustee has been appointed to represent the estate, the debtor "shall"

> (1) attend and submit to an examination at the times ordered by the court; (2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness; (3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order * * *; (4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate, and (5) file a statement of any change of the debtor's address.

Bankr. R. 4002 ("Duties of Debtor"). See also 11 U.S.C. 521(3), (4) (providing that debtor must "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties," including by "surrender[ing] to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate"). The debtor must also appear at the meeting of creditors to be examined by the trustee and to be advised of the consequences of the proceedings. *Id.* § 341; Bankr. R. 2004. These duties remain ongoing during the course of the proceedings.

Although the debtor thus bears substantial responsibilities, a number of which can generally be competently fulfilled only with legal advice, the debtor lacks funds to pay counsel. The debtor's assets are deemed to be the property of the estate (11 U.S.C. 541), which must be "surrender[ed] for distribution * * * at the time of bankruptcy" (*Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934) (emphasis omitted)). Any expenditure by the debtor of those funds without permission of the bankruptcy court is forbidden. 11 U.S.C. 549.

To solve this dilemma, Congress has long permitted the debtor's legal fees to be paid from the debtor's estate *to the extent that* they benefit the estate or are necessary to the administration of the case. The Code authorizes the debtor to retain counsel. 11 U.S.C. 329(a). The Code addresses the payment of fees to attorneys and other professionals in the provision at issue in this case, Section 330(a). 11 U.S.C. 330(a). Congress enacted this provision to *increase* the compensation paid to counsel under predecessor provisions of the bankruptcy laws. See 3 Collier on Bankruptcy ¶ 330.LH, at 330-72 (15th ed. 2002).

Subsection 330(a)(1) authorizes the court to award compensation. Subsection (a)(2) gives the Office of the United States Trustee, a division of the Department of Justice, the right to comment on and object to any fee application. Subsection (a)(3) sets forth extensive criteria for the bankruptcy court to evaluate such an objection, including "the nature, the extent, and the value of such services, taking into account all relevant factors." Subsection (a)(4) affirmatively forbids compensation for "unnecessary duplication of services," as well as for "services that were not (I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." Fees approved under Section 330 are deemed an "administrative expense" payable from the estate on a priority basis. *Id.* §§ 503(b)(2), 507(a)(1).

Section 503 of the Code contains a separate, more general provision authorizing the use of estate funds to pay for services that benefit the estate. A party such as an attorney may submit "a request for payment of an administrative expense." 11 U.S.C. 503(a). The bankruptcy court, in turn, is directed to allow as legitimate administrative expenses "the actual, necessary costs and expenses of preserving the estate." *Id.* § 503(b)(1)(A).

Sections 330 and 503 are relevant only if the attorney is to be compensated from the property of the estate. They are inapposite to the extent the debtor seeks to pay counsel from

non-estate funds, as when, prior to the commencement of the bankruptcy proceedings, the debtor secures counsel and pays the attorney a particular form of retainer. 11 U.S.C. 329(a). If properly framed, and if permitted under the legal ethics rules of the state in question, the retainer is the property of the *attorney* rather than the property of the *estate*. The bankruptcy court has substantially less control over such a retainer, which is reviewed not under the searching standards of Section 330(a)(3) and (4), *supra*, but instead simply for whether it "exceeds the reasonable value of [the attorney's] services" (*id.* § 329(b)).

2. Congress substantially revised and recodified the fee provisions of Section 330(a) in 1994. The question presented by this case is whether Congress in the 1994 Act implicitly intended to prohibit bankruptcy courts from compensating attorneys even for services beneficial to the estate. The question arises because the statute, as revised, contains an obvious scrivener's error. Section 330(a) contains two conjoined lists that contain irreconcilable references to the debtor's attorney:

> [T]he court may award to a trustee, an examiner, [*sic*] a professional person employed under section 327 or 1103--(A) reasonable compensation for actual, necessary services rendered by *the* trustee, examiner, professional person, or *attorney*.

11 U.S.C. 330(a)(1)(A) (emphasis added). For ease of reference, we will call the former list (which does not refer to the debtor's attorney and contains a grammatical error by omitting the conjunction "or") the "payees list," because it identifies persons who may be paid compensation. We will call the latter list (which does refer to the attorney) the "providers list," because it identifies the parties that provide compensable services.

Prior to the adoption of the current version of Section 330(a) in 1994, both lists referred to the debtor's attorney. The question presented by this case is whether the omission

of the phrase "debtor's attorney" from the payees list in 1994 overcomes the other provisions of the Bankruptcy Code that authorize compensating the debtor's attorney and thus prohibits the payment of fees to the debtor's counsel from the estate, thereby effecting a sea change in bankruptcy law. A divided panel of the Fourth Circuit answered that question in the affirmative. The majority denied that Section 330(a) was at all ambiguous and therefore refused to consider whether the court's holding could be rationalized with other statutory provisions, the purpose of the Code, the legislative history, or past Code practice. The court of appeals thereby parted ways with a majority of courts, which hold that Congress in 1994 did not intend to abrogate the longstanding authority to compensate counsel for services that benefit the bankruptcy estate.

3. Equipment Services, Inc., a mine services company, hired petitioner John M. Lamie, an attorney, to represent the company in its bankruptcy proceedings. Prior to the commencement of the proceedings, the company paid Lamie a $6,000 retainer. Petitioner spent an initial $1,000 to cover the cost of preparing a petition for Chapter 11 reorganization and to pay the $830 filing fee. Petitioner held the remaining $5,000 of the retainer in a client escrow account.

Petitioner filed the petition for relief in December 1998. The bankruptcy court then appointed him counsel for the debtor. Petitioner represented Equipment Services in its Chapter 11 proceeding, earning $1,325 in fees for 10.5 hours of work and incurring $3.85 in expenses. Among other things, petitioner filed an adversary complaint against a creditor relating to equipment held by the debtor in a mine.

When the debtor was unable to secure insurance on the equipment in its custody, the U.S. Trustee successfully moved to have the case converted from a Chapter 11 reorganization to a Chapter 7 liquidation. As in all Chapter 7 cases, the bankruptcy court named a trustee to oversee the liquidation. See 11 U.S.C. 701(a). Over the course of the next several

months, petitioner worked a further 8.1 hours on the case (totaling $1,000 in fees), often under order of the court or at the request of the trustee. The U.S. Trustee does not dispute in this Court that petitioner's services were non-duplicative, necessary to the administration of the case, and beneficial to the bankruptcy estate.[1]

For example, on the date the bankruptcy court converted the case to a Chapter 7 proceeding, March 17, 1999, petitioner wrote to the debtor to explain that the conversion had occurred and to discuss steps the debtor potentially could take to reconvert the case to Chapter 11. The bankruptcy court's conversion order also required "the debtor(s) (or Trustee)" to file a report detailing any debts incurred, or property acquired, by the debtor since the bankruptcy filing. App. 15a; 11 U.S.C. 521(1). In this case like many others, the debtor's counsel (here, petitioner) took responsibility for filing the report (App. 17a-18a) because the newly appointed trustee was not familiar with the debtor's assets and liabilities.

Next, in April 1999, petitioner prepared and filed an amendment to the bankruptcy schedules to reflect a claim filed by an additional creditor. App. 19a-21a. He also distributed a required notice of the "Section 341" creditors meeting. App. 22a; see 11 U.S.C. 341. Petitioner appeared with the debtor at the creditors' meeting. See 11 U.S.C. 341(d) (providing that debtor must be available for examination). Soon thereafter, at the request of the trustee, petitioner held a telephone call regarding the status of the equipment held in the mine. See *id.* § 521(3) (debtor is required to cooperate with trustee).

In December 1999, petitioner appeared at a hearing on the adversary complaint that he had previously filed on behalf of the debtor. Petitioner then wrote to advise the debtor that it

[1] Any properly preserved argument by the U.S. Trustee that petitioner's services were not sufficiently beneficial to qualify for payment under the Code would be left for remand.

was essential to coordinate with the trustee regarding proceedings on the complaint. Petitioner also advised the debtor regarding issues relating to a lien that had the potential to reduce the equipment's value to the estate.

In January 2000, petitioner provided the trustee with the adversary complaint, together with an order substituting the trustee as the plaintiff. App. 25a; see 11 U.S.C. 521(4) (duty to provide materials to trustee). At the trustee's request, petitioner coordinated with the creditor's counsel the exchange of witnesses and exhibits regarding a hearing on the complaint. App. 26a.

In March 2000, once again at the trustee's request, petitioner investigated allegations that the equipment in the mine had been damaged by flooding. App. 27a-28a. Based on that investigation, the trustee requested that petitioner attend a meeting between the trustee, the debtor, and an asset-recovery firm regarding the equipment.

4. Since at least the Bankruptcy Act of 1898, Congress has authorized bankruptcy courts to compensate debtors' attorneys from the assets of the estate in both reorganizations and liquidations. In June 2000, petitioner submitted to the bankruptcy court a request to approve the modest $2,325 in fees he had earned, and $3.85 in expenses he had incurred, throughout the case. Respondent U.S. Trustee, however, opposed that portion of the fee request ($1,000) relating to petitioner's work during the Chapter 7 stage. The U.S. Trustee contended that Section 330(a), as revised and recodified in 1994, forbids the bankruptcy court from awarding such fees because, although the providers list refers to the debtor's attorney, the payees list omits the reference to the debtor's attorney that was included in the pre-1994 version of the statute. See *supra* at 4 (quoting the statute).

The U.S. Trustee did not, however, oppose petitioner's application for the $1,325 in fees for services he provided before the case was converted to Chapter 7. Section 330(a) applies generally to fee requests, including in *both* Chapter 7

and Chapter 11 cases. Nonetheless, the U.S. Trustee took the view, favorable to petitioner, that several Code provisions in combination authorized petitioner to receive fees during the Chapter 11 proceedings not as a *debtor's* attorney but instead as a *trustee's* attorney. A Chapter 11 debtor in possession has the rights of a trustee (*id.* § 1107(a)), including the right under Section 327 of the Code to hire an attorney (*id.* § 327(a)). Section 330(a)'s payees list, in turn, authorizes the bankruptcy court to award fees to "a professional person employed under section 327."

The U.S. Trustee also disputed petitioner's alternative argument that, without regard to Section 330(a), he was entitled to be paid all his fees, including the $1,000 for work during the Chapter 7 proceedings, from the $6,000 pre-petition retainer. The U.S. Trustee acknowledged below that certain types of retainers – so-called "general" or "classic" retainers – become the property of the *attorney* upon payment and thus are not part of the bankruptcy *estate*. The attorney's receipt of such a retainer is accordingly subject to review by the bankruptcy court under Section 329(b) only to determine if it "exceeds the reasonable value of [the attorney's] services" rather than under the more searching standards of Section 330(a)(3) and (4). But the U.S. Trustee argued that the particular retainer paid by Equipment Services to petitioner in this case did not so qualify, but rather remained the property of the estate because it authorized petitioner to draw upon it only as he performed legal services and furthermore obligated petitioner to return to the debtor any balance remaining at the conclusion of the proceedings.

5. The bankruptcy court agreed with the U.S. Trustee's contention that Section 330(a)(1) does not authorize petitioner to receive payment for the fees he earned during the Chapter 7 proceedings. See Pet. App. 32a-38a. The court acknowledged that its interpretation renders Section 330(a)(1) "arguably internally inconsistent with" the statute's providers list, which authorizes payment for services rendered by "the * * * attorney." *Id.* 35a. Further, the court acknowledged

that "the absence of legislative history and a brief review of the syntax of the statute might indicate that" the absence of "attorneys" from the payees list "was inadvertent." *Id.* 36a. But the court found it dispositive that "the current version of 330(a)(1) is the result of a deletion by Congress [of the phrase 'or a debtor's attorney' from the payees list] that resulted in a statute which is clearly at odds with its pre-amendment version." *Id.* 35a.

The bankruptcy court agreed with petitioner, however, that Section 330(a) simply did not govern his fee application because the retainer he had been paid by Equipment Services was his property, not "property of the estate." The court rejected the U.S. Trustee's proposed distinction among types of retainers (Pet. App. 42a), reasoning that "the client cannot retain the benefit of the services being rendered and yet to be rendered by the attorney and at the same time demand a refund of the current unearned balance of the retainer" (*id.* 38a). On the bankruptcy court's view, "[o]nly to the extent that a balance remains in the retainer after all services have been rendered and fees have been allowed under § 329 does the reversionary interest of the debtor in that balance become property of the bankruptcy estate." *Id.*

The bankruptcy court recognized "the unsatisfactory potential consequences of a decision which places a premium upon a debtor's attorney obtaining a retainer large enough to cover in advance any and all legal services which might reasonably be contemplated during the entire case." Pet. App. 43a. The refusal to award fees altogether, however, would create

> a very powerful disincentive * * * to attorneys to accept Chapter 7 cases in the first place, or to provide anything beyond the most perfunctory required post-petition services to the client in those Chapter 7 cases that were accepted. Particularly in the context of a Chapter 7 corporate debtor without interested, willing, and financially able owners or

> affiliates, the likelihood of payment for post-petition services by the debtor's attorney precluded from relying on his retainer for payment would appear to be doubtful at best.

Id. 42a. The bankruptcy court concluded that the retainer Equipment Services had paid to petitioner was reasonable in light of the services he provided (see 11 U.S.C 329(b)) and accordingly approved the award of all of petitioner's requested fees from it. Pet. App. 43a-44a.

6. The district court affirmed in all respects. Pet. App. 15a-27a. The district court agreed with the bankruptcy court that Section 330(a) does not authorize the award of attorney's fees to a debtor's attorney in light of "the mysterious disappearance from the Bankruptcy Code" of the reference to the debtor's counsel in the payees list. *Id.* 19a. The court acknowledged that "[n]o principled reason appears in any legislative history for the removal of the crucial words, nor is there a record of any debate of the deletion." *Id.* 22a. Further, "[t]here are doubtless strong policy reasons for *not* omitting a chapter 7 debtor's attorney from eligibility for fees paid from the debtor's estate, particularly since § 330 limits compensation to those services 'reasonably likely to benefit the debtor's estate.'" *Id.* 24a (quoting 11 U.S.C. 330(a)(4)(A)(ii)(I)). But the court did not deem it "nonsensical" for Congress to have withdrawn the bankruptcy courts' authority to award fees to debtors' attorneys from the property of the estate. *Id.*

The district court nonetheless agreed with the bankruptcy court that Section 330(a) was irrelevant to this case, and that petitioner was entitled to be paid from the pre-petition retainer he received from Equipment Services, because the retainer was petitioner's property, not property of the estate. The district court reasoned that, although "a chapter 7 debtor's attorney may not be entitled under the Bankruptcy Code to compensation from the estate, the debtor is not prohibited from being represented and until such

representation is ended, the debtor–and hence, the debtor's bankruptcy estate–is not entitled to a refund." Pet. App. 26a.

7. On the U.S. Trustee's appeal, a divided panel of the Fourth Circuit affirmed the district court's holding that Section 330(a)(1) forbids compensating debtors' attorneys from estate property, but it reversed the holding that the particular retainer paid by Equipment Services in this case was petitioner's property and thus immune from review under Section 330(a). The court of appeals therefore disallowed payment of the $1,000 petitioner earned during the Chapter 7 proceedings. The court acknowledged that its decision conflicted with rulings of the Second, Third, and Ninth Circuits. Pet. App. 2a, 6a-7a.

a. The Fourth Circuit majority held that "the plain language of the 1994 version of § 330(a)" is "unambiguous and is reasonable in application." Pet. App. 8a-9a. The court did not rest its decision on any literal prohibition against paying the debtor's attorney. Rather, it inferred that Congress so intended in recodifying the statute: "The 1994 version clearly omits the prior authorization to compensate the debtor's attorney from a Chapter 7 estate." *Id.* Deeming the deletion "plain," the court refused to consider contrary indications of congressional intent: "When a statute is unambiguous, canons of construction prevent us from considering outside sources, such as legislative history, to attempt to discern what Congress may or may not have intended to do." *Id.* 9a.

The Fourth Circuit separately reversed the lower courts' determination that the retainer received by petitioner was not part of the bankruptcy estate. The court of appeals agreed with petitioner and the U.S. Trustee that retainer agreements can be shaped to become property of the attorney, rather than property of the estate, and thus to avoid the provisions of Section 330(a):

> Retainer agreements can take various forms. For example, a retainer can be paid simply to ensure an

> attorney's availability to represent the client, whether or not services are ever performed. Or a retainer can be a prepayment for all future services to be performed, amounting to a flat fee. Under either one of these arrangements, the attorney acquires title to the retainer fee at the time he receives it, regardless of whether he thereafter performs legal services for the client. On the other hand, if the relationship is a trust arrangement in which the attorney holds the retainer for the client as security for the payment of future fees, then the retainer so held, less any fees charged against it, constitutes the property of the client.

Pet. App. 11a (citing *Indian Motorcycle Assocs.* v. *Mass. Housing Finance*, 66 F.3d 1246, 1254 (CA1 1995)). But under the particular retainer agreement in this case, the Fourth Circuit concluded that, as a matter of Virginia law, "until [petitioner] earned fees, the account remained the property of Equipment Services so that in the end, if any of the $6,000 remained, [petitioner] would be required to return the balance to Equipment Services." *Id.* The retainer was accordingly "property of the estate" and could only be used to pay fees consistent with Section 330(a). *Id.*

b. In dissent, Judge Michael agreed with the panel majority that the retainer was part of the bankruptcy estate but disagreed with its interpretation of Section 330(a)(1). See Pet. App. 13a-14a. He would have adopted the conclusion of the Second, Third, and Ninth Circuits that when Congress revised and recodified "§ 330(a) in 1994, it inadvertently deleted debtors' attorneys from the existing statutory list of those who could be paid from the bankruptcy estate for services rendered in bankruptcy proceedings." *Id.* 13a. Because the bankruptcy court had only considered the reasonableness of the retainer under Section 329(b), and thus had not applied the more stringent guidelines for awarding fees set out in Section 330(a)(3) and (4), Judge Michael would have "vacate[d] the award of attorney's fees to [petitioner] for his post-Chapter 7 services and * * * remand[ed] for the bankruptcy court to evaluate [petitioner's] fee application under the proper standard." *Id.* 14a.

8. This Court subsequently granted certiorari to decide the following question: "Does 11 U.S.C. § 330(a)(1) authorize a court to award fees to a debtor's attorney?" Pet. i. Petitioner did not challenge the court of appeals' state-law determination that the particular retainer in this case was property of the estate, rather than of petitioner. *Id.* 8 n.2. The U.S. Trustee did not cross-petition (see S. Ct. R. 12.5) from so much of the judgment below as authorized petitioner to be paid for his services at the Chapter 11 stage of the proceedings.

SUMMARY OF THE ARGUMENT

The Fourth Circuit reasoned that the "plain language" of the Bankruptcy Code prohibits compensating debtors' attorneys from the funds of the bankruptcy estate because Section 330(a), as revised and recodified in 1994, omits the reference to the debtor's attorney that previously appeared in the statute's payees list. The negative inference drawn by the court of appeals exclusively from that one omission is unsound. It fails to account for the fact that Section 330(a) contains an obvious scrivener's error that renders the statute ambiguous: the payees and providers lists are inextricably intertwined, yet one refers to the debtor's attorney while the other does not. Both cannot be enforced as written. Nor is the failure of the payees list to mention the debtor's attorney dispositive of the power to compensate counsel, for that power can be located in other provisions of the Code as well. For those reasons and others, this Court can properly construe Section 330(a) only by looking beyond the isolated text of the payees list to factors such as the text of the statute as a whole, the animating purposes of federal bankruptcy law, and past practice under the Code.

The text and structure of Section 330(a), as well as other provisions of the Bankruptcy Code, demonstrate that the court

of appeals erred. Each party named in the providers list refers back to a parallel reference in the payees list. For example, "a trustee" may receive compensation for services by "the trustee." The better view is accordingly that, in retaining the authority in the providers list to pay compensation for the services of "the * * * attorney," Congress in 1994 necessarily assumed that an attorney would receive that compensation. Equally important, the court of appeals' decision cannot be reconciled with two other provisions that Congress added to Section 330(a) in the 1994 Act: subsection (a)(4) sets forth standards for paying the debtor's counsel; and subsection (a)(5) incorporates the power to pay the debtor's counsel interim compensation.

The legislative record furthermore demonstrates that the omission upon which the court of appeals seized was inadvertent, not a purposeful deletion from Section 330(a). The statute was the result of a last-minute amendment to the 1994 Act that, among other things, removed the phrases that appeared both immediately before and immediately after "or the debtor's attorney" in the payees list. Every indication – including from the Act's legislative history and the statement of the amendment's sponsor – is that the drafter made the mistake of striking all the text from the beginning of the first phrase to the end of the second. The inadvertent nature of the omission is confirmed by the fact that the amendment deleted even the conjunction "or," leaving the payees list grammatically incorrect.

The absence of any indication in the legislative record that Congress intended to eliminate the power to compensate debtors' counsel takes on still greater significance in light of the profound conflict that result would have with fundamental policies embodied by the Bankruptcy Code. Congress recognized in enacting Section 330(a) that counsel will not serve if they cannot be paid, a result that the bankruptcy system cannot countenance. Debtors have numerous important responsibilities that often can be fulfilled only with the assistance of an attorney. Even if the power to pay

counsel were eliminated only in the more than one million cases a year in which a trustee has been appointed to administer the assets of the estate – a result the text cannot sustain – the negative consequences for bankruptcy administration would be so profound that it is almost inconceivable that Congress could have intended to incur them.

Finally, this case is controlled by the canon of construction that legislation will not be construed to depart dramatically from longstanding bankruptcy practice absent some affirmative indication of congressional intent. The history of the payment of the fees of debtor's counsel in bankruptcy is one written in three parts: practice under the Bankruptcy Act of 1867; procedures under the Act of 1898; and procedures under the current Bankruptcy Code. The history is also one of three relevant themes: the gradual expansion of the role of debtor's counsel in bankruptcy proceedings; the recognition of the fairness and need for counsel to be paid from the estate in order to ensure the orderly administration of the estate and that essential services are performed; and the eventual abandonment of the concept that services performed in a bankruptcy case are less deserving of payment than other legal services offered in the marketplace generally. In reviewing this history, one observation is particularly striking. In exercising its rulemaking authority under the Act of 1867, this Court adopted a "General Order" abrogating the prior practice of allowing the fees of debtor's counsel to be paid out of the debtor's estate. Subsequently, in enacting the Act of 1898 (and, later, the provisions of the current Bankruptcy Code), Congress explicitly, consistently, and repeatedly repudiated the Court's prohibition. Given this express and sustained determination by Congress, the conclusion that it in 1994 implicitly removed authorization for the payment of the fees of debtor's counsel from Section 330 is tantamount to ascribing to Congress a view that it had never previously

embraced and, indeed, purposefully rejected at the close of the nineteenth century.

The judgment should accordingly be reversed.

ARGUMENT

I. Section 330(a) Contains a Scrivener's Error that Requires the Court To Consider the Text, Purpose, and History of the Statute and the Code as a Whole To Determine Its Meaning.

The Fourth Circuit held that the Bankruptcy Code does not permit the bankruptcy court to compensate petitioner for the services he provided in the Chapter 7 proceedings in this case, notwithstanding that those services benefited the bankruptcy estate. The panel majority refused to consider anything beyond the isolated text of Section 330(a)'s payees list – such as the text of the Code as a whole, the legislative history, the policies embodied by federal bankruptcy law, and prior practice. It maintained that the "plain language" of Section 330(a) compelled its construction. Pet. App. 8a. But that characterization by the majority of the statute considerably overstates the ruling's textual support. No provision of the Bankruptcy Code provides, as the court of appeals held, that the bankruptcy court is prohibited from compensating a debtor's attorney from the debtor's estate. The court of appeals instead rested its decision on the fact that "[t]he 1994 version clearly omits the prior authorization to compensate the debtor's attorney." *Id.* The decision below thus relies not on a statutory *proscription* against compensating counsel but on a negative *inference* that the absence of the phrase "a debtor's attorney" from the payees list of the 1994 Act is purposeful and controlling over other provisions of the Bankruptcy Code.

This Court should conclude that, for at least four reasons, the inference drawn by the court of appeals cannot alone bear the weight of its dramatic holding that Congress in 1994 eliminated the bankruptcy court's power to award fees to the

debtor's attorney from the property of the estate. Instead, the proper construction of Section 330(a) requires the Court to consider other sources that inform the statute's meaning.

First, the Fourth Circuit's contention that the text of Section 330(a) is "plain" is wrong. The statute is facially ambiguous, not clear, and contains an obvious scrivener's error. It sets forth two lists that are ineluctably tied together:

> The court may award to a trustee, an examiner, [*sic*] a professional person employed under section 327 or 1103--(A) reasonable compensation for actual, necessary services rendered by *the* trustee, examiner, professional person, or *attorney* * * *.

11 U.S.C. 330(a)(1) (emphases added). The two lists are facially irreconcilable. Either Congress inadvertently omitted the "debtor's attorney" from the "payees" list, on which the court of appeals relied, or it inadvertently retained the reference to the attorney in the latter, "payees" list.[2] The 1994 Act also omitted the necessary conjunction "or" from the payees list, further evidencing the carelessness of the scrivener. There is no apparent reason, other than a drafting error, that Congress would have rewritten the statute to produce a grammatically incorrect provision.

Although petitioner believes that the drafting error was the omission of "or the debtor's attorney" from the payees list rather than the retention of the reference to the attorney in the providers list (see Part II-A, *infra*), the inescapable point for present purposes is that the statute contains a mistake of some kind. The court of appeals thus erred in drawing an inference exclusively from the text of the payees list in disregard of the

---

[2] The lower courts themselves essentially acknowledged that the two lists are inconsistent. See Pet. App. 9a (court of appeals' recognition that, on its reading, "the reference in [the providers list] to 'attorney' may be superfluous"); *id.* 35a (bankruptcy court's acknowledgment that payees list is "arguably internally inconsistent with" providers list).

"cardinal rule that a statute is to be read as a whole" (*Wash. State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 123 S. Ct. 1017, 1025 (2003)) and without regard to other indicia of congressional intent. Construction of the Bankruptcy Code, in particular, is a uniquely "holistic endeavor." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Second, the Fourth Circuit reasoned from the false premise that Congress in 1994 amended Section 330(a) by specifically deleting the reference to the debtor's counsel from the payees list. See Pet. App. 8a-9a. In reality, Congress substituted a new, and substantially different, version of Section 330(a). See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224(b), 108 Stat. 4106, 4130 (substituting new provision in place of former Section 330(a) that substantially revised subsection (a)(1) and added entirely new subsections (a)(2)-(6)). And as more fully described in Part III, *infra*, the phrase "debtor's attorney" was itself omitted from the substitute bill only in a last-minute overhaul of the whole provision. The change was thus in no sense the targeted and purposeful deletion from the predecessor Bankruptcy Code imagined by the court of appeals.

Third, the Bankruptcy Code contains authority to compensate counsel other than in the payees list of Section 330(a). The providers list on its face authorizes the fee award in this case, directing the bankruptcy court to award "reasonable compensation for actual, necessary services rendered by *the* * * * *attorney*." 11 U.S.C. 330(a)(1)(A) (emphasis added). Section 330(a) must be read to "give meaning to each element" of the statute (*Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 542 (2001)), and thus to each element of the providers list. Section 503 similarly provides for the payment of administrative expenses to the extent they represent "the actual, necessary costs and expenses of preserving the estate." Our point is not that Section 503 permits compensation in circumstances *clearly precluded* by Section 330; it logically does not. Rather, because the literal

terms of the Code authorize the bankruptcy court to award fees in these circumstances, the negative inference drawn from the single statutory omission cited by the Fourth Circuit is not strong enough to justify its sweeping holding.

Fourth, it is simply implausible to believe that, if Congress actually did intend to make the radical departure from past practice of eliminating the power to compensate debtors' counsel, it would have done so in the oblique and ham-fisted manner of the 1994 revision to the statute. As just described, the 1994 Act eliminated only one of the two references to the attorney in Section 330(a). In addition, as we show in the next section, every other relevant source of statutory construction contradicts, and ultimately defeats, the inference drawn by the Fourth Circuit. Petitioner's position is thus supported by the text of the Code, the history of the 1994 Act, past practice, and the purposes of federal bankruptcy law. The leading treatise on bankruptcy law thus urges courts to recognize that the omission from the payees list is simply a drafting error:

> [S]ection 330(a)(1) of the Code deletes the reference to "the debtor's attorney" as a party who may be allowed compensation. Clearly this result was unintended * * *. [It] would represent a fundamental change in the law. * * * Because the change is inconsistent with current case law and the legislative history of section 330 does not support such a drastic change, courts should construe the deletion as unintended.

3 Collier ¶ 330.LH[5].

This Court has not hesitated to reject an inference, like that drawn by the court of appeals in this case, which is supported by an omission from a statute but is contradicted by other evidence in the text as well as the history of the provision's enactment and common sense. "An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence

of congressional intent." *Burns* v. *United States*, 501 U.S. 129, 136 (1991). Such a negative inference is "a valuable servant, but a dangerous master" and has no place where, as in this case, it "leads to inconsistency or injustice." *Ford* v. *United States*, 273 U.S. 593, 612 (1927) (citation omitted); see also *Chevron U.S.A.* v. *Echazabal*, 536 U.S. 73, 84 (2002) ("*Expressio unius* just fails to work" in such situations.).

II. The Decision Below Conflicts with the Text and Structure of Section 330(a) and Other Provisions of the Bankruptcy Code.

A. The better reading of the text of Section 330(a) is that Congress did not intend to eliminate the authority to compensate debtors' attorneys.

1. Interpreting Section 330(a) involves a forced choice between giving full effect to the payees list (which does not refer to the debtor's attorney) or instead to the providers list (which does). The text does not conclusively resolve the inconsistency, but what guidance it does provide undermines the Fourth Circuit's decision. The payees and providers lists function in parallel: "a trustee" may receive compensation for services by "the trustee"; "an examiner" for services by "the * * * examiner"; and "a professional person employed under section 327" for services by "the * * * professional person." 11 U.S.C. 330(a)(1). Read consistently, by retaining the reference in the providers list to "*the* * * * attorney," Congress assumed that an "attorney" would receive payment for the attorney's services. Cf. *United States* v. *Morton*, 467 U.S. 822, 828 (1984) (a statutory term "must be read in light of the immediately following phrase").

In addition, the providers list is grammatically correct; the payees list, which omits not just "a debtor's attorney" but also the introductory conjunction "*or*," is not. We are not suggesting that statutes deserve respect only in proportion to how well they are written. Rather, as between two closely related but flatly irreconcilable provisions contained in direct

succession, Congress more likely made an inadvertent mistake in the provision that contains the grammatical error.

2. The alternative reading of Section 330(a) pressed by the U.S. Trustee faces the equally substantial obstacle that it is logically inconsistent. The decision below reasons that Congress purposefully omitted the phrase "debtor's attorney" from Section 330(a), retaining only the authority to compensate distinct actors in the bankruptcy process: "a trustee, an examiner, [*sic*] a professional person employed under section 327 or 1103." The Fourth Circuit's premise was thus that Congress drafted the 1994 Act intending to *distinguish* the "debtor's attorney" from, *inter alios*, "a professional person employed under section 327."

But the U.S. Trustee elsewhere *rejects* that very premise, arguing that the debtor's attorney in some instances should be deemed "a professional person employed under section 327." In an effort to minimize the negative consequences of its construction of Section 330(a), respondent maintains that bankruptcy courts retain the authority to compensate debtors' counsel in Chapter 11 cases in which no trustee has been appointed.[3] Section 330(a) by its terms applies to attorney's fees in all forms of bankruptcy, including in cases under both Chapter 7 and Chapter 11, and furthermore without regard to whether a trustee has been appointed to administer the assets of the estate. The U.S. Trustee nonetheless asserts – without any support in the legislative record – that Congress in 1994 intended to eliminate the authority to pay the debtor's attorney *only* in Chapter 7 proceedings and those Chapter 11 proceedings in which no trustee has been appointed. It reasons that, in Chapter 11 cases in which there is no trustee,

---

[3] As noted *supra* at 13, the U.S. Trustee has not challenged in this Court that portion of the judgment in this case that authorizes petitioner to be paid from the bankruptcy estate for the services he provided during the Chapter 11 proceedings. Our point is that the U.S. Trustee's concession that petitioner is entitled to those fees rests on an internally contradictory reading of Section 330(a).

the debtor in possession has a trustee's power to retain an attorney (11 U.S.C. 327(a), 1107(a)), who may in turn be compensated under Section 330(a) not as an "attorney" but as a "professional person employed under section 327."

The U.S. Trustee cannot have it both ways. If Congress in 1994 intentionally eliminated the authority to compensate "a debtor's attorney" but not "a professional person employed under section 327" from Section 330(a), without making any special provision for certain Chapter 11 proceedings, then that deletion must be given full effect. Yet neither *any court* nor the U.S. Trustee endorses the view that Congress intended to eliminate entirely the power to compensate counsel in all cases. But that is the inevitable consequence of the Fourth Circuit's reading of the statute.

The "debtor's attorney" furthermore cannot be equated with a "professional person employed under section 327" because the Code consistently distinguishes those two terms. See 11 U.S.C. 330(a) (providers list), 331 (interim compensation authority). Statutes will not be read so as to render their terms "altogether redundant." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 574 (1995).

B. The Fourth Circuit's holding that Congress intended in the 1994 Act to prohibit bankruptcy courts from compensating counsel with funds of the debtor's estate cannot be reconciled with two provisions that Congress added to Section 330(a) at that time.

The most significant change made by Congress in revising and recodifying Section 330(a) in 1994 was its addition of detailed criteria under which the bankruptcy court is to determine whether, and to what extent, fees should be paid. The 1994 Act specifically added two new subsections relating to attorney compensation. The fact that the enactment on which the Fourth Circuit rested its decision *expressly contemplates* paying debtors' attorneys refutes its conclusion that Congress simultaneously intended to *eliminate* that very authority.

1. Section 330(a)(4), added in 1994, contains a categorical prohibition on awarding fees in certain circumstances, but provides an exception for attorneys in a subset of bankruptcies:

> (A) *Except as provided in subparagraph (B)*, the court shall not allow compensation for--
>
> (i) unnecessary duplication of services; or
>
> (ii) services that were not--
>
> (I) reasonably likely to benefit the debtor's estate; or
>
> (II) necessary to the administration of the case.
>
> (B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation *to the debtor's attorney* for representing the interests *of the debtor* in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. 330(a)(4) (emphases added).

The 1994 Act, in Section 330(a)(4), thus explicitly contemplates that bankruptcy courts will award compensation to a "debtor's attorney" under subsection (a)(1). Congress adopted general standards governing the award of compensation (subsection (a)(4)(A)) that incorporate a specific exception that more permissively allows the award of fees to the debtor's attorney in a subset of cases otherwise subject to the general rule (subsection (a)(4)(B)). Neither the general rule nor the exception makes sense if, as the Fourth Circuit held, Congress intended in 1994 to render debtors' attorneys ineligible to receive compensation in the first instance. Put another way, the U.S. Trustee cannot offer a reading of the statute under which the special standards for compensating counsel in Chapter 12 and Chapter 13 cases actually operate, as the text requires, as an exception to the general standards of subsection (a)(4)(A).

The status of subsection (a)(4)(B) as an exception – as opposed to an affirmative grant of authority to compensate counsel only under Chapters 12 and 13 – is confirmed by the fact that it refers only to compensating the debtor's counsel for "representing the interests of *the debtor*" (emphasis added) but directs the bankruptcy court in awarding compensation to consider "the other factors set forth in this section," which include the "benefit [to] *the debtor's estate*" (emphasis added). The authority to pay compensation to the debtor's attorney for representing the interests of *the debtor's estate* must therefore arise from some other Code provision. Indeed, in virtually every context – including all instances under Chapter 7 and Chapter 11, and with respect to the payment of parties other than the debtor's counsel (such as the trustee) even under Chapters 12 and 13 – the *sine qua non* of compensation is benefit to the estate. See 11 U.S.C. 330(a)(3). It is difficult to imagine that Congress intended to compensate counsel in Chapter 12 and Chapter 13 cases for services that benefit the debtor but to forbid their compensation for the services they provide that benefit the estate.

2. Subsection 330(a)(5), also added by the 1994 Act, furthermore incorporates the authority to compensate debtors' counsel on an interim basis that is set forth in Section 331. It directs bankruptcy courts to "reduce the amount of compensation awarded under [Section 330(a)(1)] by the amount of any interim compensation awarded under section 331." 11 U.S.C. 330(a)(5). Section 331, in turn, employs the traditional list and provides that compensation may be paid to "[a] trustee, an examiner, *a debtor's attorney*, or any professional person employed under section 327." 11 U.S.C. 331 (emphasis added). Subsection (a)(5) thus contemplates the availability of interim compensation for all the parties named in Section 331; no exception was made for that paid to debtors' attorneys. Congress in 1994 could not have intended, as the Fourth Circuit concluded, to forbid that very compensation.

Relatedly, the Fourth Circuit's decision impermissibly reads out of the Code the explicit authority conferred by Section 331 to award debtors' attorneys interim compensation. "Obviously, if a debtor's attorney is eligible to apply for interim payments, she must be eligible for payments in the first place." *In re Taylor*, 250 B.R. 869, 871 (E.D. Va. 2000).

III. The Circumstances Surrounding the 1994 Recodification of Section 330(a) Refute the Claim that Congress Intended To Eliminate the Authority To Compensate Counsel.

The preceding analysis doubtless raises the question of the source of the scrivener's error that omitted the debtor's attorney from the payees list but retained it in all related sections. "No principled reason appears in any legislative history for the removal of the crucial words, nor is there a record of any debate of the deletion." Pet. App. 22a. The answer lies in examining what actually changed in the 1994 amendments and how specific sentences were moved at the last minute. Both the providers and payees lists of Section 330(a)(1) as currently enacted are derived from similar provisions of the prior Code. Although the 1994 Act included a variety of wording differences beyond the omission of "a debtor's attorney," none was substantive.[4] Nothing suggests

---

[4] The differences between the provisions, with deletions struck out and additions italicized, are as follows:

> (a)*(1)* After notice to ~~any~~ *the* parties in interest and ~~to~~ the United States Trustee and a hearing, and subject to sections 326, 328, and 329 ~~of this title~~, the court may award to a trustee, ~~to~~ an examiner, [*sic*] ~~to~~ a professional person employed under section 327 or 1103 ~~of this title, or to the debtor's attorney~~--
>
> > ~~(1)~~*(A)* reasonable compensation for actual, necessary services rendered by ~~such~~ *the* trustee, examiner, professional person, or attorney~~, as the case may be,~~

that Congress in 1994 intended to do anything other than carry forward with minor wording changes the predecessor provisions governing the persons to whom compensation may be paid. To the contrary, as noted, the redrafted version of Section 330(a)(1) retains the debtor's attorney in the providers list.

The reference in the payees list to the debtor's attorney appears simply to have been inadvertently omitted when Section 330(a) was overhauled through a "last minute addition * * * to the 1994 Act." 3 Collier ¶ 330.LH[5], at 330-75. As originally introduced, the bill that became the 1994 Act would have revised Section 330(a), by making each of the non-substantive wording changes to subsection (a)(1) just noted, one of which is relevant here: the bill would have deleted the phrase "of this title" that appeared immediately *before* "or to the debtor's attorney" in the payees list. The bill also would have inserted, immediately *after* the reference to the debtor's attorney, an additional provision directing the U.S. Trustee to review fee applications. It provided:

> (a)(1) After notice to the parties in interest and the United States trustee and a hearing, * * * the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, *or the debtor[']s attorney*, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any

---

> and by any paraprofessional persons employed by ~~such trustee, professional person, or attorney, as the case may be~~ *any such person* * * *.

> paraprofessional person employed by any such person * * *[.]

S. 540, 103d Cong. (1993), *reprinted in* S. Rep. No. 168, 103d Cong., 1st Sess. (1993) (emphasis added).

On April 21, 1994, the day the Senate passed the Act, it considered fifteen separate amendments prior to final passage. "The Bankruptcy Reform Act of 1994 comprehensively covers a wide range of bankruptcy provisions. Due to the breadth of the amendments, technical errors are to be expected." 3 Collier ¶ 330.LH[5], at 330-76.[5] The amendment at issue here, No. 1645, substantially reorganized the provisions of the proposed replacement version of Section 330(a). With respect to subsection (a)(1), it carried forward the proposed deletion of the phrase "of this title" that appeared before "or the debtor's attorney." The amendment also deleted and moved to a new subsection (a)(2), the newly proposed provision relating to the U.S. Trustee's authority to review fee applications that had appeared immediately after the reference to the debtor's attorney. 140 Cong. Rec. S4741-01 (daily ed. Apr. 21, 1994). But the amendment also omitted the phrase "or the debtor[']s attorney" that appeared between

---

[5] Indeed, the 1994 amendments introduced an array of errors into the Code: Sections 330(a)(3)(A) and 546(g) appear twice; the Code skips from Section 101(2) to Section 101(4), with the former Section 101(3) moved to Section 101(21B); Section 101(56A) was inserted between Sections 101(53C) and 101(53D); Sections 365(c)(4) and (d)(5) through (d)(9) were not deleted as expired, yet subsection (p) was; Section 522(f)(2) was redesignated as Section 522(f)(1)(B), but the cross-reference in Section 522(g)(2) was left unchanged; new Section 523(a)(15) was placed at the end of Section 523 rather than at the end of Section 523(a); Section 362(b)(14) was renumbered as 362(b)(17), but the cross-reference in Section 553(b)(1) was not corrected; Section 553(b)(1) refers to Section 546(h), which does not exist because there are two Section 546(g)'s; and Section 726(b) refers to a nonexistent Section 1009.

the two purposeful deletions; the drafter struck from the beginning of one to the end of the other, apparently without recognizing the phrase in between. In other words, the omission seems to have been, quite literally, a "slip of the pen."

The legislative history furthermore contradicts the suggestion that Amendment No. 1645 purposefully deleted the authority to pay fees to debtors' counsel. The 1994 version of Section 330(a) sought "to codify many of the factors previously considered by courts in awarding compensation and reimbursing expenses." 3 Collier ¶ 330.LH[5], at 330-73. "The purpose of these amendments was to foster greater uniformity in the application, processing and approval of fees. To accomplish this goal, the amendments expand[ed] the factors that courts should consider in approving fee applications, recognize[d] a bankruptcy court's authority to review fee applications sua sponte and require[d] the executive office of the United States trustee to establish national guidelines for the allowance of fees and expenses." Norton Bankruptcy Law and Practice § 26:5, at 206 (2d ed. 1997 Supp.). "Coincidentally, the language providing for objections, which [the] amendment removed from § 330(a)(1) in the reorganization, was contained in a clause that happened to fall immediately after the term 'debtor's attorney,' although the two subject matters were *entirely unrelated*." *In re Century Cleaning Servs.*, 195 F.3d 1053, 1059 (CA9 1999) (emphasis added).

Indeed, directly contrary to the Fourth Circuit's decision, the legislative history contemplates that fees *will be paid* to debtors' attorneys. The definitive report on the 1994 Act states that Section 330(a), as revised,

> requires the United States Trustee to invoke procedural guidelines regarding fees in bankruptcy cases and file comments with fee applications. These changes should help foster greater uniformity

> in the application for and processing and approval of fee applications.

H.R. Rep. No. 835, 103d Cong., 2d Sess. 51 (1994); 140 Cong. Rec. H10,769 (daily ed. Oct. 4, 1994). The sponsor of the amendment in question, Senator Metzenbaum, similarly explained that it

> sets forth in clear and concise terms those factors that must be considered when deciding the appropriateness of a fee request. * * * In addition, the U.S. trustees will be required to adopt uniform procedural guidelines for the review of fee applications and where appropriate, object to a fee request.

140 Cong. Rec. S14,597-02 (daily ed. Oct. 7, 1994).

There is no substantial support in the legislative record for the contrary holding of the court of appeals. As noted, nothing in the legislative history suggests the deletion of the phrase "a debtor's attorney" was purposeful. One piece of written testimony provided to a Subcommittee of the House Judiciary Committee during consideration of the 1994 Act noted, in passing, "the apparently inadvertent removal of debtors' attorneys from the list of professionals whose compensation awards are covered by section 330(a)." *Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on Econ. & Commercial Law of the Comm. on the Judiciary*, 103d Cong. 551 (1994). In the unlikely event members of Congress were aware of this snippet, they likely agreed with its conclusion that the omission was inadvertent and would not alter the statute's meaning.

Subsequent to the Act's adoption, two "technical corrections" bills were introduced in the House that included, among their provisions, an amendment reinserting the debtor's attorney to the payees list. H.R. 120, 105th Cong. § 7 (1997); H.R. 764, 105th Cong. § 4 (1997). "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste*

Agency v. United States Army Corps of Engineers, 531 U.S. 159, 169-70 (2001). That rule is particularly apt here. Given the circuit conflict, the failure to pass corrective legislation does not indicate support for one reading of Section 330(a) over the other. The technical corrections bills may not have passed for a host of reasons, including objections to any of the several other amendments to the Bankruptcy Code they proposed.

The circumstances surrounding the omission of the phrase "a debtor's attorney," as confirmed by the legislative history, thus support the conclusion that Congress did not intend the radical change of prohibiting bankruptcy courts from compensating debtors' counsel but rather made an inadvertent error in the course of a last-minute statutory reorganization.

IV. The Fourth Circuit's Decision Conflicts with Basic Bankruptcy Policies and Produces an Absurd Result.

The inference drawn by the Fourth Circuit that Congress intended to eliminate the power to compensate counsel out of the assets of the bankruptcy estate is implausible for the further reason that it would entail an inexplicable, wholesale departure from not only the purpose of Section 330(a) as revised in 1994 but also the guiding principle of the "prompt and effectual administration" of federal bankruptcy law as a whole (*Katchen* v. *Landy*, 382 U.S. 323, 328 (1966)). The Code embodies Congress's recognition that the sound administration of the bankruptcy process requires imposing on debtors a variety of requirements, many of which can be fulfilled only by counsel. The 1994 Act does not eliminate any of these obligations of debtors. See, *e.g.*, 11 U.S.C. 341, 343, 521; Bankr. R. 1007(a), 2004, 4002.

This case is a perfect illustration. The owners of Equipment Services, a small mine services company, had no capacity to prepare either the Chapter 11 filing or the adversary complaint that petitioner filed on behalf of the debtor. Nor would the debtor have been aware of either the

significance of the conversion of the case to a Chapter 7 proceeding or its obligation to cooperate with the appointed trustee. Upon conversion, only counsel would have had the knowledge and experience either to arrange the "Section 341" creditors meeting or to coordinate the proceedings on the adversary complaint.

Commentators agree that the policies embodied by the Code require compensating debtors' attorneys in order to ensure the operation of the bankruptcy process:

> There are several postpetition services commonly performed by the debtor's attorney in chapter 7 proceedings that are necessary to the administration of the estate. If debtors' attorneys' compensation is not permitted, this may have the effect of denial of counsel, or at the very least, lead to debtors representing themselves. This possibility may lead to increased errors and time spent to correct those errors, thereby further extending the time necessary to adjudicate all parts of the case.

Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 Bankr. Dev. J. 201, 219-20 (2001). We have collected other representative cases illustrating the valuable services provided by debtors' counsel, including in Chapter 7 proceedings and Chapter 11 proceedings in which a trustee has been appointed, in the Appendix, *infra*, at 29a-32a.

Counsel generally will not, of course, agree to serve a client in bankruptcy without compensation. Congress's point in enacting and subsequently revising Section 330(a) – a purpose which the Fourth Circuit's decision serves to defeat – was to ensure that attorneys are willing and able to represent parties to the bankruptcy process. "[I]t has become clear over the years that it is most difficult to attract competent attorneys to perform the often complex legal services required in bankruptcy if they must constantly be preoccupied with the manner in which they are to be paid * * *." W. Homer

Drake, Jr., Bankruptcy Practice for the General Practitioner § 10.14 (3d ed. 2002). The decision below thus runs contrary to the "principal goal" of ensuring "open access" to bankruptcy relief. Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Part II, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977); see also, *e.g.*, *In re UNR Indus., Inc.*, 986 F.2d 207, 210 (CA7 1993) (Section 330 is designed to ensure "that attorneys [would] be reasonably compensated and that future attorneys [would] not be deterred from taking bankruptcy cases due to a failure to pay adequate compensation. * * * [T]he important thing is to provide compensation in bankruptcy equivalent to that outside it."); *In re Pontiac Hotel Assocs.*, 92 B.R. 715, 716 (E.D. Mich. 1988) ("Bankruptcy judges may award compensation to a debtor's attorney pursuant to 11 U.S.C. § 330. This statute was designed to ensure that bankruptcy counsel would command fees comparable to non-bankruptcy counsel, and thus that competent professionals would be attracted to the bankruptcy field." (citing H.R. Rep. No. 595, *supra*, at 329-30)).

It is no answer that, as respondent suggests, the trustee can secure the assistance of counsel, including the counsel who previously represented the debtor (see 11 U.S.C. 327, 328(b)), who can be compensated as the trustee's lawyer under Section 330(a). That prospect is sufficiently uncertain – including because the choice would be left to the trustee and because the debtor's counsel may be deemed to have a preclusive conflict of interest (see 11 U.S.C. 327(a)) – that counsel will refuse to come into the case in the first instance. The Code also imposes distinct duties on *the debtor*, which needs its own counsel throughout the proceedings. But even if that were not so, respondent's proposal would be self-defeating at best, as it would provide no substantive benefit to the bankruptcy process but instead would give rise to an inefficient and ultimately purposeless process in which the parties regularly file form motions to name the debtor's lawyer as the counsel to the trustee.

The Fourth Circuit's view of Congress's intent is furthermore implausible even if, as the U.S. Trustee proposes, Section 330(a) is read to eliminate the power to compensate counsel not in every bankruptcy proceeding but instead in Chapter 7 cases and Chapter 11 cases in which a trustee has been appointed. If attorneys know that they cannot be compensated for work done under Chapter 7, then they will be loath to take on a Chapter 11 case for fear that a trustee will be appointed or (as in this case) the proceeding will be converted to Chapter 7. The construction of Section 330(a)(1) adopted below creates in the attorney's mind the fear that he or she will be left "working for free," in part because "state law ethical obligations may require an attorney to continue to perform as counsel, regardless of the potential prohibition of payment." Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 1999 ABI J. LEXIS 79, at *7-*8 (June 1999). Fearing that the canons of ethics would prevent them from abandoning their client once a trustee entered the case, attorneys will stay away from the outset. Cf. Model Rules of Professional Conduct Rule 1.16(b) (permitting attorneys to withdraw from representing a client only "if withdrawal can be accomplished without material adverse effect on the interests of the client" or if other unusual circumstances exist).

But in any event, there are more than one million Chapter 7 filings every year, more than twice the number for all other forms of bankruptcy combined. *2001 Year-End Totals for Filings Reach New High*, The Bankruptcy Strategist, Apr. 2002, at 1. Even those judges who read the text of the payees list to eliminate only the right to compensation in that subset of cases recognize the grave consequences of the rule they grudgingly apply. The bankruptcy judge in this case thus wrote that, in his experience, the failure to pay counsel will give rise to "a *very powerful* disincentive * * * to attorneys to accept Chapter 7 cases in the first place, or to provide

anything beyond the most perfunctory required post-petition services." Pet. App. 42a (emphasis added). Judge Thomas of the Ninth Circuit similarly recognized that the policies underlying Section 330 point in "favor of allowing attorneys to receive reimbursement under § 330. There are several post-petition services commonly performed by the debtor's attorney in Chapter 7 proceedings that are necessary to the administration of the estate." *Century Cleaning Servs.*, 195 F.3d at 1060 (dissenting opinion). "Categorical exclusion of fees can only result in denial of access to justice, with debtors unrepresented or under-represented. The increase in *pro se* cases, and in cases which become *pro se* after the petition is filed, does not aid the administration of our bankruptcy system." *Id.* at 1064.[6]

There also is no reason to believe that Congress decided to forbid compensating counsel under Section 330(a) in order to preserve the assets of the estate. Congress addressed the question of asset preservation in subsections (a)(3) and (a)(4), which set forth detailed criteria for awarding fees, and which forbid compensation (except in cases under Chapters 12 and 13) for "unnecessary duplication of services" and services that are not "(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case." "There are doubtless strong policy reasons for *not* omitting a chapter 7 debtor's attorney from eligibility for fees paid from the debtor's estate, particularly since § 330 limits compensation to those services 'reasonably likely to benefit

[6] There is also no reason Congress in 1994 would have chosen to eliminate the right to compensation from the assets of the estate in Chapter 7 cases and Chapter 11 "debtor out of possession" cases as the Fourth Circuit supposed, but simultaneously preserved (and even enhanced) the right to compensation in all other forms of bankruptcy. The distinction cannot be that the assets are being liquidated, for there is no liquidation under Chapter 11. Nor can the distinction be the presence of a trustee, for a trustee is appointed in Chapter 12 and 13 cases as well. See 11 U.S.C. 1202, 1302.

the debtor's estate.'" Pet. App. 24a (quoting 11 U.S.C. 330(a)(4)(A)(ii)(I)) (emphasis added). "The bankruptcy court may reduce or even disallow the requested amount of compensation when no real benefit is conferred upon the debtor's estate by the services for which the applicant seeks compensation." 3 Collier ¶ 330.03[3], at 330-25 (collecting cases). We have collected representative cases illustrating the scrutiny that bankruptcy courts apply to fee applications submitted by debtors' counsel, including in Chapter 7 proceedings and Chapter 11 proceedings in which a trustee has been appointed, in the Appendix, *infra*, at 33a-35a. The Fourth Circuit nonetheless attributed to Congress an illogical, penny-wise and pound-foolish determination to eliminate entirely – as a purportedly asset-preserving measure – compensation that is essential to debtors' receipt of legal services that are "necessary" and "benefi[cial]" to the value of the estate.

Indeed, the Fourth Circuit's decision is likely to have the absurd consequence in many cases of *reducing* the assets of the estate, as well as the bankruptcy court's control over fee awards. Congress could not have intended either result, given that the principal innovation of the 1994 Act was the adoption of more stringent standards for the court to apply in reviewing fee applications. The court of appeals held, and the U.S. Trustee agreed, that debtors and their counsel may enter into pre-petition "general" retainer agreements that, because they are the debtor's property rather than property of the estate, will be reviewed only for their "reasonableness" under Section 329(b) rather than under the more stringent standards of Section 330(a). See Pet. App. 11a. There can be no dispute regarding "the unsatisfactory potential consequences of a decision which places a premium upon a debtor's attorney obtaining a retainer large enough to cover in advance any and all legal services which might reasonably be contemplated during the entire case." *Id.* 43a. Indeed, the attorney will logically insist that the retainer be enhanced to account for the risk that services required in the proceeding

will be more extensive than anticipated, thereby reducing the funds that are ultimately available to creditors as a part of the estate.[7]

V. Congress Would Not Have So Profoundly Changed Prior Bankruptcy Practice Without Any Acknowledgement in the Statutory History.

The Fourth Circuit's decision implausibly attributes to Congress the intent to abandon silently over a century of established bankruptcy law authorizing the payment of the fees of debtor's counsel from the assets of the bankruptcy estate. "When Congress amends the bankruptcy laws, it does not write on 'on a clean slate.'" *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992). As this Court has repeatedly made plain, "[w]e * * * 'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990)); see also *Davenport*, 495 U.S. at 565 (Blackmun, J., joined by O'Connor, J., dissenting) ("This Court carefully has set forth a method for statutory analysis of the Bankruptcy Code. * * * * To determine the drafters' intent, the Court presumes that Congress intended to keep continuity between pre-Code judicial practice and the enactment of the Bankruptcy Code in 1978." (citations omitted)). Applying this approach in a series of cases, the Court has indicated time and again that, in construing the provisions of the Code, it will not presume that Congress intended to overturn an established bankruptcy rule

[7] Although some jurisdictions prohibit such retainers (see, *e.g.*, *In re Craig*, 265 B.R. 624, 629 (Bankr. M.D. Fla. 2001) (discussing Florida law)), others do not, and it is unlikely that Congress intended to make the availability of compensation in federal bankruptcy proceedings turn on the nuances of individual states' attorney ethics rules.

sub silentio, but will instead require any intent to change the law to be "unmistakably clear." *Cohen*, 523 U.S. at 222.

Since the adoption of the Constitution, Congress has enacted five distinct bankruptcy acts. The first, the Act of 1800, and the second, the Act of 1841, contained no express provision for the compensation of debtor's counsel out of the property of the debtor's bankruptcy estate. See Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803); Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843); 3A Collier ¶ 64.01, at 2046-47 (14th ed. 1988).[8]

Enacted in the wake of the Civil War, the Nation's third bankruptcy statute – the Act of 1867 – was distinctly different. See Bankruptcy Act of 1867, ch. 176, 14 Stat. 517

[8] This is not surprising. Both statutes were enacted during a period in which imprisonment for debt was common and insolvent debtors were viewed, more often than not, as criminal offenders. See Charles Warren, Bankruptcy in United States History 52 (1935) (discussing the gradual abolishment of the practice of imprisonment for debt in the United States during the first half of the nineteenth century); James Kent et al., *Bankrupt and Insolvent Laws, Report of the Incalculable Chancellor and Judges of the Supreme Court of the State of New York* (Jan. 22, 1819), *reprinted in* 16 Niles' Wkly. Reg. 85 (1819) (extolling the virtues of the common practice of imprisonment for debt). Moreover, both bankruptcy acts were principally debt collection devices concerned with the seizure and liquidation of the debtor's property, and each contemplated little role for the debtor (or, by extension, his counsel) beyond the debtor's surrendering of his property and submission to interrogation. See Act of 1800, § 18, 2 Stat. at 26 (providing that imprisoned debtor would be subject to examination); *id.* § 20, 2 Stat. at 27 (authorizing officials administering the Act to "break open" the debtor's houses and chests and take possession of all of the debtor's property); Act of 1841, § 3, 5 Stat. at 442 (transferring the debtor's property to the bankruptcy assignee); *id.* § 4, 5 Stat. at 443-44 (providing that the debtor would be subject to examination "at all times," and would be guilty of perjury for any false statement).

(repealed 1878). First, it was crafted after the general demise of the practice of imprisonment for debt and likewise reflected emerging popular perceptions of insolvent debtors as typically "honest but unfortunate" rather than criminal. See *Edwards* v. *Kearzey*, 96 U.S. 595, 602 (1877) (remarking that "[i]mprisonment for debt is a relic of ancient barbarism" and that "[e]very right-minded man must rejoice when such a blot is removed from the statute-book"). Second, the Act expanded both the debtor's benefits in bankruptcy (primarily by providing an enhanced right of discharge) and likewise the debtor's role in the administration of the case. See *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 588 (1935) ("[t]he discharge of the debtor has come to be an object of no less concern than the distribution of his property"); *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918) (observing the importance of granting the "unfortunate" debtor a discharge); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 353-62 (1991) (discussing innovations under the Act of 1867, including expanded right of discharge).

Because the Act contemplated that the debtor would surrender all of his property at the commencement of the case to an "assignee" (essentially, a trustee), the Act logically and expressly contemplated that the debtor's expenses incurred in complying with the Act would likewise be borne by the estate, although it did not expressly address the compensation of the *debtor's* counsel. See Act of 1867, §§ 26, 28, 14 Stat. at 529-31. Exercising its rulemaking authority under the Act (see Act of 1867, § 10; see also *J.B. Orcutt Co.* v. *Green*, 204 U.S. 96, 103 (1907)), and reacting to amendments by Congress restricting the payment of most administrative expenses (Act of June 22, 1874, ch. 390, § 18, 18 Stat. 178, 184), this Court weighed in on the practice of paying the fees of debtor's counsel by abrogating it. The Court's General Order 30 provided that "no allowance shall be made against the estate of the bankrupt for fees of attorneys, solicitors, or counsel, *except when necessarily employed by the assignee*,

when the same may be allowed as disbursements." See *In re Gies*, 10 F. Cas. 339, 339 (E.D. Mich. 1875) (emphasis added). Because the debtor's counsel was employed by the *debtor* rather than the assignee, General Order 30 was thought to prevent the payment of the fees of debtor's counsel. See *id.*; *In re Handell*, 11 F. Cas. 420 (W.D. Tex. 1876) (same).

Against this backdrop, Congress revisited the issue of the payment of the fees of debtor's counsel, and rejected the approach of General Order 30, when it enacted the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. In no fewer than three separate provisions of the 1898 Act, Congress expressly authorized the payment of the fees of the debtor's attorney.[9]

---

[9] Congress so provided in Section 64(b)(3). After further amendment (including one that transferred the provisions of Section 64(b)(3) to Section 64(a)(1)), the section, as it existed immediately prior to the enactment of the Bankruptcy Code in 1978, expressly authorized the payment of "one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases * * * in such amount as the court may allow." Bankruptcy Act of 1926, Pub. L. No. 69-301, § 15, 44 Stat. 662, 667.

In addition, in 1934 Congress enacted Section 77B dealing specially with corporate reorganizations. Act of June 7, 1934, ch. 424, 48 Stat. 911, *codified at* 11 U.S.C. 207. In creating this special procedure, Congress also specifically authorized the court in reorganization proceedings to "allow a reasonable compensation for the services rendered * * * in connection with this proceeding * * * by * * * parties in interests * * * and the attorneys * * * of any of the foregoing *and of the debtor*." Bankruptcy Act of 1898, ch. 54, § 77B(c)(9), 30 Stat. 544, *codified at* 11 U.S.C. 207(c)(9) (emphasis added). In 1938, Congress replaced Section 77B with the corporate reorganization provisions of Chapter X, and specifically replaced Section 77B(c)(9) with Section 241 of Chapter X. In relevant part, Section 241(4) provided that "[t]he judge may allow * * * reasonable compensation for services rendered * * * in

As this Court subsequently explained, the touchstone for the allowance of compensation of the fees of debtor's counsel under the 1898 Act was whether those fees were "rendered in aid of the administration of the estate and the carrying out of the provisions of the act." *Conrad, Rubin & Lesser* v. *Pender*, 289 U.S. 472, 476 (1933); see also *Randolph & Randolph* v. *Scruggs*, 190 U.S. 533, 539 (1903); 3A Collier ¶ 62.31, at 1596-1600 (14th ed. 1988) (collecting cases). To the extent that they were rendered in aid of administration, fees were properly compensable and the reported decisions clearly establish the link between the payment of these fees and the useful and necessary functions of counsel for the debtor in the administration of the debtor's bankruptcy case. See *In re Kross*, 96 F. 816, 819 (S.D.N.Y. 1899); 3A Collier ¶ 62.31[3], at 1604-10 (14th ed. 1988); *id.* ¶ 62.31[4], at 1610-12 (analyzing fees compensable under Section 64); 6A Collier ¶ 13.04, at 571-76 (14th ed. 1988) (analyzing fees compensable under Section 241).

As summarized by one court, although the 1898 Act authorized compensating the debtor's counsel, it required strict frugality:

> The amount of compensation should be based, in ordinary cases, upon the nature of the case, the extent and character of the work actually performed, and the amount involved in the controversy. In bankruptcy cases, while these elements should properly be considered in fixing the compensation of the attorney, the policy of the act should be steadily

---

a proceeding under this chapter * * * (4) by the attorney for the debtor." See also former Chapter X Rule 10-215(c)(1) (providing a similar authorization).

Finally, in addition to Sections 64 and 241, Congress also added the provisions of Chapter XII governing real property arrangements and, in doing so, added Section 491. Act of 1898, § 491, 11 U.S.C. 891. Section 491(4) is identical in all material respects to Section 241.

> kept in view, that is, that it should be administered with *severe economy* * * * so as to reduce to the lowest minimum the costs of administration.

In re Lang, 127 F. 755, 757 (W.D. Tex. 1904) (emphasis added); see also 3A Collier ¶ 62.05[1], at 1427 (14th ed. 1988).

When Congress enacted the 1978 Bankruptcy Code after ten years of study, it continued in Section 330(a) the practice of providing for the payment of the fees of debtor's counsel out of the assets of the estate. Significantly, in enacting Section 330, the debate in Congress focused not on the practice of compensating the debtors' counsel *vel non*, but rather on the standard by which professional fees would be allowed. That debate was resolved in favor of *enhancing* compensation. As described in the definitive joint statement of the floor managers of the 1978 Act:

> Section 330(a) contains the standard of compensation adopted in H.R. 8200 as passed by the House rather than the contrary standard contained in the Senate amendment. Attorneys' fees in bankruptcy cases can be quite large and should be closely examined by the court. However, bankruptcy legal services are entitled to command the same competency of counsel as other cases. In that light, the policy of this section is to compensate attorneys and other professionals serving in a case under title 11 at the same rate as the attorney or other professional would be compensated for performing comparable services other than in a case under title 11 * * *. Notions of economy of the estate in fixing fees are outdated and have no place in [the] bankruptcy code.

124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6442; 124 Cong. Rec. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini), *reprinted in* 1978

U.S.C.C.A.N. 6505, 6511. Section 330 thus reflected an intentional liberalization of the award of attorney's fees in bankruptcy cases in favor of attracting skilled representation. See 3 Collier on Bankruptcy ¶ 330.LH[4] (15th ed. rev. 2001).

In sum, other than a brief deviation by this Court under its rulemaking authority that was corrected by Congress in a subsequent legislative revision, there has *never* been a question for over a century that compensation for debtors' counsel comes from the estate. Legislative revision has focused on ways to watch-dog that compensation and perceived problems of quality of representation, but never on the long-established question of compensation *simpliciter*. In the 1994 Act, either Congress swept aside this century of long-settled practice without a hint of deliberation, or the scrivener erred in a statutory amendment that contains both a grammatical error and an internal inconsistency on its face. This Court's precedents holding that Congress will not be held to have dramatically departed from prior bankruptcy practice without discussion compel the latter conclusion.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

John M. Lamie
BROWNING, LAMIE & GIFFORD, P.C.
P.O. Box 519
Abington, VA 24212

G. Eric Brunstad, Jr.
P.O. Box 208215
127 Wall St.
New Haven, CT 06520

Craig Goldblatt

WILMER, CUTLER & PICKERING
2445 M St., NW
Washington, DC 20037

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

John A. E. Pottow
Assistant Professor of Law
University of Michigan Law School
625 South State St.
Ann Arbor, MI 48109

May 30, 2003

RELEVANT STATUTORY PROVISIONS

11 U.S.C. 327(a) provides in relevant part:

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys * * * or other professional persons * * * to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. 328(a) provides in relevant part:

The trustee * * *, with the court's approval, may employ * * * a professional person under section 327 or 1103 of this title * * * on any reasonable terms or conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis.

11 U.S.C. 329 provides:

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel such agreement, or order the return of any such payment, to the extent excessive, to –

(1) the estate, if the property transferred –

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. 330(a) provides:

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, [*sic*] a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including--

(A) [*sic*] the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for--

(i) unnecessary duplication of services; or

(ii) services that were not--

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

11 U.S.C. 331 provides:

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order of relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

11 U.S.C. 501(a) provides in relevant part:

A creditor * * * may file a proof of claim.

11 U.S.C. 502 provides in relevant part:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest * * * objects.

(b) * * * [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim * * * and shall allow such claim in such amount, except to the extent that –

* * *

(4) if such claim is for services of an * * * attorney of the debtor, such claim exceeds the reasonable value of such services;

* * * .

11 U.S.C. 503 provides in relevant part:

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1)(a) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case; * * *

(2) compensation and reimbursement awarded under section 330(a) of this title;

* * * .

11 U.S.C. 507(a) provides in relevant part:

The following expenses and claims have priority in the following order:

(1) First, administrative expenses allowed under section 503(b) of this title * * *.

11 U.S.C. 726(a) provides in relevant part:

Except as provided in section 510 of this title, property of the estate shall be distributed –

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title * * *.

11 U.S.C. 1107(a) provides:

Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF VIRGINIA

ABINGDON DIVISION

IN RE: EQUIPMENT SERVICES, INC.

CHAPTER 7

NO.: 98-04851-WSA-7

NOTICE

TO ALL CREDITORS AND PARTIES OF INTEREST:

PLEASE TAKE NOTICE that on July 6, 2000 at 10:00 a.m. I will appear before the Judge of this court in the United States District Courtroom at Abingdon and move for approval of my Fee Application filed in this case requesting fees in the amount of $2,325.00 and costs in the amount of $3.85.

_____

John M. Lamie
Browning, Lamie & Sharp, P.C.
P.O. Box 519
Abingdon, VA 24210
Counsel for Equipment Services, Inc.

CERTIFICATE

I, John M. Lamie, do hereby certify that I have mailed a true and correct copy of the foregoing Notice to the debtor, all creditors and parties in interest listed on the bankruptcy matrix, Robert Wick, Trustee, PO Drawer 8, Bristol, Virginia 24203 and the United States Trustee, 280 Franklin Road, S.W., Roanoke, VA 24011, on this the 2 day of June, 2000.

_____

John M. Lamie

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

IN RE: EQUIPMENT SERVICES, INC.
CHAPTER 7

NO.: 98-04851-WSA-7

APPLICATION FOR FEES

Comes now John M. Lamie, counsel for the debtor in the above proceeding, and applies for fees as follows:

1. John M. Lamie has represented Equipment Services, Inc. in this bankruptcy case from December 24, 1998 until the date of this Fee Application. This case commenced as a Chapter 11 and converted to Chapter 7 on March 17, 1999.

2. During that time he has provided legal services to the debtor as follows: drafting bankruptcy petition and schedules, conferring with the debtor on financial matters, appearing at Court proceedings and representing the debtor in the bankruptcy proceedings.

3. He has expended through May 31, 2000 $0.00 in costs and provided 18.60 hours of legal services. An itemized statement of the costs and expenses is attached hereto.

4. Additional costs are $3.85 for mailing the Fee Application and Notice.

5. The hourly rate for John M. Lamie in his representation of the debtor was $125.00 per hour and the debtors have paid $6,000.00 as a retainer in this proceeding. (*From the retainer the filing fee of $830.00, an Aaversary Proceeding filing fee of $150.00 and an Amendment fee of $20.00 was paid*).

6. The fees expended in this proceeding were reasonable and necessary expenses for representing the debtor and were incurred in the best interest of the estate.

WHEREFORE, John M. Lamie prays that the Court approve his Fee Application in this proceeding for $2,325.00 and costs in the amount of $3.85.

Respectfully submitted,

_____

John M. Lamie
Counsel for the Debtor

EQUIPMENT SERVICES
Case No. 98-04851
Our File No. 98-0409A

DATE	SERVICES RENDERED	TIME SPENT
12/24/98	Cover letter to the Court w/Chapter 11 voluntary petition, List of 20 Largest Unsecured Creditors, etc.	1.0
12/31/98	Review U.S. Trustee package	0.2
12/31/98	Draft letter to client re: forms	0.2
12/31/98	Instruct assistant on preparation of schedules	0.1
1/4/99	Review Debtor-In-Possession Order	0.1
1/4/99	Letters to client re: US Trustee forms, telephone conferences w/US Trustee for 1/15/99 @ 11:00a.m., and Application for Order Approving Employment of Attorney	0.3
1/5/99	Call from Mr. Dowdy about High Hops collection effort of this debt.	0.2
1/11/99	Cover letter to the Court w/Motion for Extension of Time in Which to File Schedules	0.2
1/13/99	Review correspondence from the IRS	0.1
1/13/99	Letter to client re: reminder of hearing set for 1/29/99 @ 10 a.m.	0.1
1/15/99	Cover letter to the Court w/Application for Order Approving Employment of Attorney and Declaration	0.2
1/15/99	Letter to the US Trustee's office w/copy of Application for Order Approving Employment of Attorney and Declaration and proposed Order	0.2

1/15/99	Letter to F. Bradley Pyott, Esq. re: L.B.J. Coal Co., Inc. Complaint	0.2
1/20/99	Cover letter to the Court w/Amended Declaration	0.2
1/22/99	Letter to the US Trustee's Office re: mailed originals of the Debtor-in-Possession Report by the Debtor	0.2
1/26/99	Review final draft of schedules	0.3
1/27/99	Review correspondence from B. Copeland re: Motion to Compel	0.1
1/27/99	Letter to client re: Motion to Compel filed by B. Copeland	0.1
1/27/99	Cover letter to the Court w/remaining schedules	0.2
1/28/99	Review correspondence from B. Copeland re: request for copy of schedules and Motion for Relief on behalf of Carlis McGlothlin	0.1
1/29/99	Appear at 341 meeting	0.5
2/1/99	Review correspondence from B. Copeland re:Notice of Appearance and Request for All Notices, Plans and Disclosure Statements	0.1
2/1/99	Letter to H.P. Hess w/ Application for Order Approving Employment of CPA	0.2
2/3/99	Letter to client w/Corporate Resolution and Application to Approve the Employment of CPA	0.2
2/17/99	Review Notice of Hearing from B. Copeland for 3/16/99 @ 11:00 a.m. re: Hiope Mining, Inc. v. Equipment Services, Inc.	0.1
2/18/99	Call to clients re: Equipment move	0.3
2/18/99	Draft Complaint	0.5
2/19/99	Phone dep. of witness on AP	0.3

2/22/99	Call from Copeland re: equipment	0.2
2/22/99	Call to Dowdy	0.2
2/23/99	Proof AP draft	0.3
2/23/99	Cover letter to the Court w/AP, filing fee	0.2
2/24/99	Review correspondence from B. Copeland re: Emergency Motion to Appoint Trustee or to Designate Responsible Individual or to Appoint Examiner and/or Convert to Ch. 7 and Motion to Shorten Time	0.1
2/25/99	Review correspondence from B. Copeland re: Amended Motion for Relief	0.1
2/25/99	Review Service of Process of Summons and Complaint	0.1
2/26/99	Review motion from Hiope and call Mr. Dowdy about hearing.	0.3
3/1/99	Call Mr. Dowdy about hearing on Motion for a Trustee	0.3
3/3/99	Review fax correspondence from the US Trustee re: Motion for a Trustee/insurance	
3/6/99	Call Lee Dowdy about insurance on equipment	0.3
3/8/99	Review correspondences from B. Copeland re: Counter Claim and Answers	0.1
3/8/99	Letter by fax to the US Trustee re: letter of 3/3/99	0.2
3/10/99	Call client and U.S. Trustee re: insurance on equipment	0.1
3/13/99	Telephone conference re: litigation over mine site	0.5
3/16/99	Appear at hearing on the AP & motions of L.B.J., et al.	1.0
3/17/99	Letter to client re: 3/16/99 AP and hearing	0.2

3/22/99	Review Order Converting Case	0.1
3/23/99	Review file, notice of appeal, write client and Trustee	0.4
3/31/99	Cover letter to the Court w/ Final Report of the Debtor-In-Possession	0.2
3/31/99	Prepare Notice of Amendment for client to sign	0.2
4/6/99	Letter to the Court w/Notice of Amendment to Equipment Services, Inc. bankruptcy	0.1
4/13/99	Letter to client re: Ch. 7 341 meeting set for 4/21/99 @ 3 p.m.	0.1
4/19/99	Review Proof of Claim from Charlie Jessee on behalf of Lee and Loretta Dowdy	0.1
4/21/99	Appear at 341 meeting	0.5
4/27/99	Telephone conference with Chris Ruhe and Bob Copeland Re: equipment at the mine	0.2
5/24/00 [sic]	Review Proof of Claim from Charlie Jessee on behalf of American Bit Company	0.1
10/22/99	Letter to client re: status of AP and reminder of status hearing on 12/6/99 @ 9 a.m.	0.1
12/6/99	Review fax correspondence from B. Copeland re: Temporary Restraining Order	0.1
12/8/99	Review correspondence from B. Copeland re: Emergency Motion to Relieve Stay, If Applicable, to Secure Property of Movant	0.1
12/10/99	Review Temporary Restraining Order	0.1
12/10/99	Review correspondence from the Court re: filing fees	0.1
12/14/99	Hearing	0.5

12/15/99	Cover letter to Judge Stone w/Order on AP	0.2
12/20/99	Letter to client re: status of case	0.2
1/21/00	Letter to Bob Wick w/copy of complaint, Bob Copeland's Answers and order substituting as plaintiff	0.2
1/24/00	Review correspondence from Bob Wick re: Exchange of names of witnesses and photocopies of exhibits	0.1
2/16/00	Appear at Trial	0.5
3/8/00	Call to/from client re: allegations mine is flooded	0.2
3/8/00	Letter to Bob Wick re: allegations mine is flooded with equipment in it.	0.2
3/20/00	Review Notice of Filing Appeal	0.1
3/23/00	Letter to Bob Wick re: Notice 3/20/00	0.2
3/23/00	Letter to client re: Court's ruling and status of case	0.2
3/24/00	Review Amended Notice of Appeal to The US District Court	0.1
3/27/00	Review Designation of Issues on Appeal and Designation of Record on Appeal	0.1
5/17/00	Review Brief of the Appellant	0.1
5/25/00	Draft and review Fee Application	0.5
5/31/00	Prepare Fee Application, cover letter and Notice of Hearing	2.0
	Total Hours Expended	18.60

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

In re: **EQUIPMENT SERVICES, INC.** Debtor(s)	Case No. 98-04851-HPA-7 Chapter 7

ORDER CONVERTING CASE

It is hereby ORDERED that this case be, and the same hereby is, converted from a case under Chapter 11 to a case under Chapter 7 of Title 11 of the United States Code; and it is further

ORDERED

that the debtor(s) (or Trustee) in the superseded case shall file with the Court a final report and account within thirty (30) days from the date of the entry of this Order. Said report shall include a schedule of unpaid debts incurred after commencement of the superseded case. Said report shall also include the name, address and zip code in MATRIX form of all such additional creditors.

It is further ORDERED that if an Order confirming a plan was entered in the superseded case, the debtor(s) (or Trustee) shall file with the Court (A) a schedule of property not listed in the final report and account, which property was

acquired after the filing of original petition but before the entry of this Conversion Order; (B) a schedule of unpaid debts not listed in the final report and account, additionally in matrix form, incurred after confirmation but before entry of this Conversion Order; and (C) a schedule of executory contracts entered into or assumed after the filing of the original petition but before entry of this Conversion Order.

Service of a copy of this Order shall be by mail to the debtor(s), attorney for the debtor(s), Trustee, if any, U.S. Trustee, and all creditors and parties in interest.

DATED: March 17, 1999

H. Clyde Pearson, Judge
U.C./S.C

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

Larry G. Browning
John M. Lamie
Gerald F. Sharp
Please reply to the Abingdon Office

John M. Heuser
John J. Gifford
Eric Reese, Paralegal

March 31, 1999

John W. L. Craig, II, Clerk
United States Bankruptcy Court
P.O. Box 2390
Roanoke, VA 24010

RE: Equipment Services, Inc.
Chapter 7 Case No. 98-04851-HPA-7

Dear Mr. Craig:

Please find enclosed, for filing, the Final Report of the Debtor-in-Possession in the above referenced case.

Thank you for your kind assistance.

Sincerely yours,

John M. Lamie

pma
Enclosure
xc: US Trustee (w/enc)

P.O. Box 850
Grundy, VA 24614
540-935-5240
Fax 540-935-7232

P.O. Box 459
Lebanon, VA 24266
540-889-1182
Fax 540-889-2215

P.O. Box 519
Abingdon, VA 24212
540-628-6165
Fax 540-628-4847

P.O.Box 827
Wytheville, VA 24382
540-228-2119
Fax 540-228-2032

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

IN RE: EQUIPMENT SERVICES, INC.	) CHAPTER 7
	) CASE NO.
Debtor.	) 98-04851

FINAL REPORT BY CHAPTER 11 DEBTOR-IN-POSSESSION

The debtor, Equipment Services, Inc., by counsel, files as its Final Report of the Debtor-in-Possession upon conversion of the case, the following:

1. Debtor incurred no additional unpaid debts after the commencement of the case.
2. Debtor acquired no new property after the commencement of the case.
3. Debtor entered into no new contracts after the commencement of this case.
4. Debtor has no funds to report in its Chapter 11 account.

Dated: March 31, 1999
EQUIPMENT
SERVICES, INC.

BY:_____
John M. Lamie

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

Larry G. Browning
John M. Lamie
Gerald F. Sharp
Please reply to the Abingdon Office

John M. Heuser
John J. Gifford
Eric Reese, Paralegal

April 6, 1999

John W.L. Craig, II, Clerk
United States Bankruptcy Court
P.O. Box 2390
Roanoke, VA 24010

RE: Equipment Services, Inc.
98-04851-HPA-7

Dear Mr. Craig:

Enclosed please find a notice of amendment for the above named debtor which I would appreciate your filing along with a check for $20.00 for the filing of same.

This is to certify that I have mailed a true copy of the notice of amendment, proof of claim, and original 341 notice, to all parties in interest.

Thank you for your kind assistance.

Sincerely yours,

John M. Lamie

pma
Enclosure

P.O. Box 850 Grundy, VA 24614 540-935-5240 Fax 540-935-7232
P.O. Box 459 Lebanon, VA 24266 540-889-1182 Fax 540-889-2215
P.O. Box 519 Abingdon, VA 24212 540-628-6165 Fax 540-628-4847
P.O.Box 827 Wytheville, VA 24382 540-228-2119 Fax 540-228-2032

United States Bankruptcy Court
for the Western District of Virginia

IN RE: EQUIPMENT SERVICES, INC.) Chapter 7
) Case No. 98-
Debtor.) 04851-HPA-7

NOTICE OF AMENDMENT TO DEBTOR'S SCHEDULES OF CREDITORS AND/OR MATRIX

Debtor, pursuant to Bankruptcy Rule 1009, hereby gives NOTICE of the names of creditors added to debtor's schedules of creditors and/or mailing matrix as follows:

NAME AND ADDRESS OF CREDITOR	DATE OF DEBT AND SECURITY IF ANY	WHETHER DISPUTED	AMOUNT
Lee and Loretta Dowdy PO Box 1805 Richlands, VA 24641	unsecured business loan	UD	$100,000.00

Dated: 4/5/99

LORETTA DOWDY, PRESIDENT

The above-named debtor(s) certifies under penalty of perjury that the foregoing is true and correct pursuant to 28 U.S.C. Section 1746.

NOTICE IS FURTHER GIVEN that the above-named creditor(s) are hereby given 10 days from the date such notice of amendment to schedules are/or mailing matrix is mailed by debtor to file objections to the granting of the discharge or to determine the non-dischargeability of such debt pursuant to 11 U.S.C. Section 727 and Section 523 and Bankruptcy Rule 7001, et seq., and Bankruptcy Rules 2004(a) and 4007(d); and to file a proof of claim herein, if it be so advised, or until the last date fixed by the Notice of the Section 341(a) meeting of

creditors, whichever period is longer; and that if a discharge has heretofore been granted, the same shall be deemed set aside for the purposes herein stated and will be deemed reinstated without further notice or order at the expiration of 30 days from this date unless timely objections are filed.

CERTIFICATION

I hereby certify that I have contacted the Bankruptcy Court Clerk's office and the above-styled case has not been closed or I have enclosed herewith a Motion to Re-open and the appropriate filing fees. I further certify that a true copy of the Notice was duly mailed on 4-6-99, to the Court, debtor, trustee, U.S. Trustee, and, if the Section 341(a) creditors' meeting notice has been issued, to the above-named creditors, which notice of amendment to said creditors shall include a copy of the Section 341(a) creditors' meeting notice, proof of claim form, and order of discharge, as applicable.

Signed:_____
JOHN M. LAMIE

Form B9D (Chapter 7 Corporation/Partnership Asset Case)(9/97)

Case Number 98-04851-HPA-7

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT VIRGINIA	
Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines A bankruptcy case concerning the debtor corporation listed below was originally filed under chapter 11 on December 24, 1998 and was converted to a case under chapter 7 on March 16, 1999. You may be a creditor of the debtor. **This notice lists important deadlines**. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.	
See Reverse Side For Important Explanations	
Debtor (name(s) and address): EQUIPMENT SERVICES, INC. PO BOX 1805 RICHLANDS, VA 24641	
Case Number: 98-04851-HPA-7	Taxpayer ID Nos.: 54-18775533
Attorney for Debtor (name and address): JOHN M. LAMIE, ESQ BROWNING, LAMIE & SHARP, P.C. P.O. BOX 519 ABINGDON, VA 24212-0519 Telephone number: (540) 628-6165	Bankruptcy Trustee (name and address): ROBERT E. WICK, TR. P.O. DRAWER 8 BRISTOL, VA 24203 Telephone number: (540) 466-4488

Meeting of Creditors:	
Date: April 21, 1999 Time: 3:00 P.M. Location: U.S. Bankruptcy Court, U.S. Courthouse, Abingdon, VA 24210	
Deadline to File a Proof of Claim: Proof of Claim must be *received* by the bankruptcy clerk's office by the following deadline: For all creditors (except a governmental unit): July 20, 1999 For a governmental unit: July 20, 1999	
Creditors May Not Take Certain Actions: The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.	
Address of the Bankruptcy Clerk's Office: 210 CHURCH AVE. SW P.O. BOX 2390 ROANOKE, VA 24010 Telephone number: 540-857-2391	**For the Court:** Clerk of the Bankruptcy Court: John W. L. Craig, II
Hours Open: Monday-Friday, 8:00 a.m.-4:30 p.m.	Date: March 17, 1999

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

Larry G. Browning
John M. Lamie
Gerald F. Sharp
Please reply to the Abingdon Office

John M. Heuser
John J. Gifford
Eric Reese, Paralegal

December 17, 1999

John W. L. Craig, II, Clerk
United States Bankruptcy Court
P.O. Box 2390
Roanoke, VA 24010

RE: Equipment Services, Inc.
Chapter 11 Case No. 98-04851-HPA-11

Dear Mr. Craig:

Enclosed please find a certificate of mailing in the above mentioned case which certifies that a true copy of the Order entered on December 16, 1999 was mailed to all parties in interest.

Thank you for your kind assistance in this regard.

Sincerely yours,

John M. Lamie

JML:rg
Enclosure

P.O. Box 850 Grundy, VA 24614 540-935-5240 Fax 540-935-7232
P.O. Box 459 Lebanon, VA 24266 540-889-1182 Fax 540-889-2215
P.O. Box 519 Abingdon, VA 24212 540-628-6165 Fax 540-628-4847
P.O.Box 827 Wytheville, VA 24382 540-228-2119 Fax 540-228-2032

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

Larry G. Browning
John M. Lamie
John M. Heuser

Please respond to the Abingdon Office

John M. Heuser
John J. Gifford
Scott S. Farthing
Eric Reese, Paralegal

January 21, 2000

Robert E. Wick, Trustee
PO Drawer 8
Bristol, VA 24203

RE: Equipment Services, Inc.
Chapter 7 Case No. 98-04851-WSA-7
Equipment Services, Inc. V. LBJ Coal Company, Inc.
And Hiope Mining, Inc.
A/P No. 7-99-00035

Dear Bob:

Please find enclosed a copy of the complaint in the above referenced adversary proceeding. Also enclosed is a copy of Bob Copeland's answers and a copy of the order substituting you as plaintiff.

Please let me know if you have any questions for me in this regard.

Sincerely yours,

John M. Lamie

pma
Enclosures

P.O. Box 850 Grundy, VA 24614 540-935-5240 Fax 540-935-7232
P.O. Box 459 Lebanon, VA 24266 540-889-1182 Fax 540-889-2215
P.O. Box 519 Abingdon, VA 24212 540-628-6165 Fax 540-628-4847
P.O.Box 827 Wytheville, VA 24382 540-228-2119 Fax 540-228-2032

ROBERT E. WICK
LAW OFFICES
THE CUMBERLAND-600 CUMBERLAND
BRISTOL, VIRGINIA 24203
MAILING ADDRESS:
POST OFFICE
DRAWER 8
TELEPHONE:
540-466-4488

January 24, 2000

John M. Lamie, Esquire
P O Box 519
Abingdon, VA 24212

In Re: Equipment Services, Inc.
Chapter 7, 237-98-04851-WSA

Dear John:

Judge Stone ordered the exchange of names of witnesses by January 31, 2000. I would appreciate your providing this information to Bob Copeland, with photocopies to me, at your very early convenience.

Likewise, I would appreciate your forwarding photocopies of all the exhibits to Bob Copeland, with photocopies to me, as this must be tendered to Mr. Copeland by February 4, 2000, pursuant to the enclosed order.

Very truly,

R.E. Wick

REW/cfs

Browning,
Lamie and Sharp, P.C.
Attorneys at Law

John M. Lamie
Gerald F. Sharp
John M. Heuser
Please respond to the Abingdon Office

John J. Gifford
Scott S. Farthing
Eric Reese, Paralegal

March 8, 2000

Robert E. Wick, Trustee
PO Drawer 8
Bristol, VA 24203

RE: Equipment Services, Inc.
Chapter 7 Case No. 98-04851-WSA-7

Dear Bob:

I have talked with Dennis Dowdy concerning the allegation that the mine is flooded with the equipment in it. Mr. Dowdy has heard several "rumors" concerning this. One story is that the mine is flooded but that the equipment had been moved to higher ground in the mine and is safe; second, the mine and equipment are flooded; and third, the equipment was removed from the mine by a back entrance and sold.

I would suggest that Larry Akers be contacted and asked to investigate this situation.

Please let me know how you wish to proceed.

Sincerely yours,

John M. Lamie

PS- Dennis did confirm that men moved the equipment to a higher part of the mine before he shut down.

John

pma

xc: Ms. Loretta Dowdy

P.O. Box 850	P.O. Box 459	P.O. Box 519	P.O.Box 827
Grundy, VA 24614	Lebanon, VA 24266	Abingdon, VA 24212	Wytheville, VA 24382
540-935-5240	540-889-1182	540-628-6165	540-228-2119
Fax 540-935-7232	Fax 540-889-2215	Fax 540-628-4847	Fax 540-228-2032

Examples Of Valuable Services Provided By Debtors' Counsel

United States Trustee v. Garvey, 195 F.3d 1053, 1060 (CA9 1999): Court remands for determination of appropriate compensation for post-petition services rendered by attorney in Chapter 7 cases. Court explains that "[t]here are several post-petition services commonly performed by the debtor's attorney in Chapter 7 proceedings that are necessary to the administration of the estate. * * * In this case, for example, [the debtor's attorney] filed the conversion petition, prepared schedules, amended reports, a statement of affairs, and a Rule 2015 report, communicated with creditors, and participated in 2004 examinations. Interpreting the ambiguous provision in § 330(a)(1) so as to eliminate the possibility of post-petition compensation for Chapter 7 debtor's attorneys would significantly alter the ability of Chapter 7 debtors to secure counsel in order to perform these services - a fundamental change in bankruptcy law."

In re Tundra Corp., 243 B.R. 575, 581 (Bankr. D. Mass. 2000): In Chapter 11 non-DIP case converted to Chapter 7, court approves fees for debtor's counsel for work on business operations; case administration; fee/employment applications; financing; meeting of creditors; seeking relief from stay proceedings.

In re Crown Oil, Inc., 257 B.R. 531, 543-44 (Bankr. D. Mo. 2000): Court allows fees "for the purpose of alleviating hardship and for allowing reasonable fees likely to benefit the estate at the time the services and expenses were provided." Court notes that attorneys "negotiated a recovery for the estate shortly after the beginning of the case consisting of a ten percent interest in the oil wells from ResourceFund, which Watts described as the single largest asset in the estate. Both Watts and Deschenes provided services in compiling and assembling the Debtor's Schedules and Statements. Deschenes represented the Debtor in the § 341 meetings of creditors in the Chapter 11 case, and after conversion in the

Chapter 7 case. Watts provided the Chapter 7 Trustee with services, records, and information regarding possible preference actions against shareholders."

In re Office Prods. of Am., 136 B.R. 964, 974 (Bankr. W.D. Tex. 1992): Attorney's fees for debtor's counsel in Chapter 7 case upheld for services related to assisting trustee with operation of unusually complex business: "The trustee knew from the beginning that he needed to operate the debtor's stores at least for a short period of time to realize the value of the assets. These operations demanded the assistance of the debtor, including working with the debtor's pre-petition lender, because only the debtor was sufficiently familiar with both legal and operational problems associated with running office products warehouse-style retail outlets located in eastern states over 1500 miles from the situs of the trustee. With inventory to account for, sales tax to take care of, and employee benefits to attend to (including making arrangements for withholding not only for federal income taxes but also state income taxes), there were many special duties imposed on this debtor not normally required of the usual debtor in chapter 7. Any actual, necessary legal services rendered to the debtor relative to its performing these important duties are compensable." Ordinarily, however, chapter 7 debtor's attorney may be compensated only for "assisting the debtor in performing his legal duties" under Bankruptcy Code Section 521 and Bankruptcy Rule 4002.

In re Wash. Mfg. Co., 21 Bankr. Ct. Dec. 1345 (Bankr. M.D. Tenn. 1991): Court concludes that Chapter 11 debtor's counsel is entitled to reasonable compensation for time and expenses in preparing, presenting and defending fee application. *See also Smith v. Edwards & Hale, Ltd.*, 305 F.3d 1078, 1088 (CA9 2002), cert. denied, 71 U.S.L.W. 3721 (2003) ("The preparation of fee applications was necessary for the administration of the case and provided a direct benefit to the estate because those services aided the trustee in determining the allocation of administrative fees.").

In re TS Indus., Inc., 125 B.R. 638 (Bankr. D. Utah 1991): Chapter 11 debtor's counsel fee application. Court upholds fee requests for general estate administration, work on specific claims against the estate, and services rendered in preparing various business agreements.

In re Colorado-Ute Elec. Ass'n, 132 B.R. 174, 180 (Bankr. D. Colo. 1991): Chapter 11 debtor's counsel entitled to fees for work in rate cases before the public utilities commission, for representation in a jurisdictional dispute regarding the commission, as well as for representation relating to "general case administration, cash collateral, employee benefits, utilities deposits, the employment of professionals, Craig 3 lease issues, other lease issues, motions for relief from stay, Public Utilities Commission intervention, and the Office of Consumer Counsel intervention." Court also allows fees for time spent preparing fee application.

In re Stoecker, 114 B.R. 965, 971 (Bankr. N.D. Ill. 1990): Court awards compensation to Chapter 11 debtor's counsel "for services provided in connection with making court appearances and reviewing, drafting, editing and revising pleadings," for "time expended reviewing and assembling voluminous documents," and for time spent resolving discovery issues with trustee's counsel and creditors' counsel, since the debtor was "the sole equity holder in the corporate cases and was asserting his Fifth Amendment privilege."

In re Holden, 101 B.R. 573 (Bankr. N.D. Iowa 1989): "An attorney for the debtor is entitled to compensation for analyzing the debtor's financial condition; rendering advice and assistance to the debtor in determining whether to file a petition in bankruptcy; the actual preparation and filing of the petition, schedules of assets and liabilities, and the statement of affairs; and representing the debtor at the Section 341 meeting of creditors.'" (citations omitted).

In re Wash. Mfg. Co., 101 B.R. 944, 954 (Bankr. M.D. Tenn. 1989): Court upholds fee award to Chapter 11 debtor's

counsel based on time spent "on research, pleadings and memoranda concerning the appointment of a trustee," as well as for time spent on efforts "to protect the estate's assets in their communications with creditors, both secured and unsecured; in their representation of the debtors in labor negotiations and in a temporary restraining order action filed by the U.S. Department of Labor; and in their representation of the debtors in defense of a manager trainee who was criminally charged and arrested in Kentucky for the debtors' failure to pay pre-petition wages."

In re Brady, 20 B.R. 936, 955-56 (Bankr. N.D. Ohio 1982): Attorney for debtor in Chapter 7 proceeding entitled to recover legal fees for filing of initial bankruptcy petition. The Court concludes that "the attorney for the debtor is entitled to be paid a legal fee for the initial filing of the petition in bankruptcy out of the assets in this estate."

Examples Of Judges Scrutinizing Fee Applications

In re Top Grade Sausage, Inc., 227 F.3d 123, 132 (3d Cir. 2000): Chapter 11 debtor's counsel fee application denied. Court finds that "[a]fter a search of the record, we are unable to ascertain any particular action by the debtor's attorney that could not have been done by the Trustee and his staff."

In re Rheam of Indiana, 133 B.R. 325, 334-35 (E.D. Pa. 1991): Fee award to debtor's attorney in Chapter 7 proceeding reduced upon bankruptcy court's determination that legal questions in the case were "extremely simple," and therefore the hourly rate should be reduced to hourly rate for junior associate from hourly rate for senior partner. Fees also denied for appeals that bankruptcy court determined were not "necessary" to represent debtor's estate.

In re Hasset, 283 B.R. 376, 381 (Bankr. E.D.N.Y. 2003): Court denies in part fee application in Chapter 11 case converted to Chapter 7 case when compensation sought for "services that went beyond the typical statutory duties required of a debtor post-conversion."

In re Berg, 268 B.R. 250, 262 (Bankr. D. Mo. 2002): Court disallows fees when counsel should have realized that reorganization was infeasible and thus services did not benefit the estate, but awards some fees when attorneys' "services in compiling and assembling the Debtor's Schedules and Statements may have ultimately aided the Chapter 7 Trustee."

In re Crown Oil, Inc., 257 B.R. 531 (Bankr. D. Mo. 2000): Court disallows fees when counsel should have realized that reorganization was infeasible and had filed false certificate of service with the court.

In re Poseidon Pools of Am., 180 B.R. 718, 732, 736, 739-40 (Bankr. E.D.N.Y. 1995): Court lowers fee amount for Chapter 7 debtor's counsel, concluding that attorney's accounting of time was "woefully deficient in providing that level of information necessary for a meaningful evaluation."

Court also disallows fee award for unnecessary document retrieval. Finally, some services rejected as duplicative.

In re Waxman, 148 B.R. 178 (Bankr. E.D.N.Y. 1992): Chapter 7 proceeding. Court concludes that attorney for Chapter 7 debtor is not entitled to compensation out of bankruptcy estate for services rendered to defend debtor against creditor's objections to discharge and dischargeability of debt.

In re Ginji Corp., 117 B.R. 983, 992 (Bankr. D. Nev. 1990): Using very careful review of application for compensation by Chapter 11 debtor's counsel (debtor out of possession case), court reduces award for "general" and "tangential" research, explaining that in case in which trustee has been appointed, "the correct approach is not to disallow fees but to scrupulously inquire into such services so as to ascertain whether or not they were for the benefit of the estate or for some other interest." Court denies fees for services duplicative of trustee's or other attorneys' efforts.

In re Grabill, 110 B.R. 356 (Bankr. N.D. Ill. 1990): Chapter 7 proceeding converted to Chapter 11 (trustee appointed). Court concludes that debtor's counsel is not entitled to compensation from estate for time spent contesting expansion of trustee's power, to extent that such services were for benefit of prepetition management rather than estate. Court carefully reviews fee application and reduces two categories, while fees are awarded in full in three categories.

In re Holden, 101 B.R. 573, 576 (Bankr. N.D. Iowa 1989): Chapter 7 debtor's counsel fees denied for defending an objection to exemptions or discharge. Court notes that "courts have been fairly restrictive in their interpretation of what benefits the estate."

In re Moss, 90 B.R. 189 (Bankr. D.S.C. 1988): Chapter 7 debtor's counsel fees for time spent contesting Chapter 7 trustee's liquidation of one of debtor's assets benefited debtor, not estate, and thus, are not compensable from estate.

In re Rhoten, 44 B.R. 741 (Bankr. M.D. Tenn. 1984): Chapter 7 debtor's counsel fees compensation from debtors' estate not allowed for work of protecting debtors' discharge or exemptions.

Supreme Court, U.S.
FILED
AUG 6 - 2003
OFFICE OF THE CLERK

No. 02-693

In the Supreme Court of the United States

JOHN M. LAMIE, PETITIONER

v.

UNITED STATES TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

THEODORE B. OLSON
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

LISA S. BLATT
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JOSEPH A. GUZINSKI
General Counsel

P. MATTHEW SUTKO
Attorney
Executive Office for United States Trustees
Washington, D.C 20530

QUESTION PRESENTED

Whether Section 330(a)(1) of the Bankruptcy Code, 11 U.S.C. 330(a)(1), authorizes a court to use the funds of a bankruptcy estate to compensate an attorney of a chapter 7 debtor.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	5
Argument:	
Section 330 does not authorize the use of estate funds to compensate a chapter 7 debtor's attorney	7
A. The plain text of Section 330(a)(1) does not authorize estate funds to be paid to a chapter 7 debtor's attorney	8
B. The statutory context is consistent with Congress's intentional deletion of the phrase "or the debtor's attorney"	14
C. The legislative history is consistent with an intentional deletion of the phrase "or the debtor's attorney"	22
D. Enforcing Section 330(a)(1) as written furthers reasonable policy objectives	33
Conclusion	44
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Am. Steel Prod., Inc., In re, 197 F.3d 1354 (11th Cir. 1999)	10, 38
BFP v. *Resolution Trust Corp.*, 511 U.S. 531 (1994)	33

Cases: Page

Century Cleaning Servs., Inc., In re, 195 F.3d 1053 (9th Cir. 1999) 10, 11, 18, 28, 40
Chan v. *Korean Air Lines, Ltd.*, 490 U.S. 122 (1989) 11, 16
Chickasaw Nation v. *United States*, 534 U.S. 84 (2001) 15
Cohen v. *de la Cruz*, 523 U.S. 213 (1998) 32, 33
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 14
Dewsnup v. *Timm*, 502 U.S. 410 (1992) 33
Director, Office of Workers' Comp. Programs v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122 (1995) 12
First Jersey Secs., Inc. In re, 180 F.3d 504 (3d Cir. 1999) 42
F/S Airlease II, Inc. v. *Simon*, 844 F.2d 99 (3d Cir.), cert. denied, 488 U.S. 852 (1988) 8
Hammock v. *Loan & Trust Co.*, 105 U.S. 77 (1881) 12
Harrison v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) 32
Hartford Underwriters Ins. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000) 11, 33
Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999) 14
Iselin v. *United States*, 270 U.S. 245 (1926) 11, 12
Louisiana World Exposition v. *Federal Ins. Co.*, 858 F.2d 233 (5th Cir. 1988) 40
Milwaukee Engraving Co., In re, 219 F.3d 635 (7th Cir. 2000) 8
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 11
Morales v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992) 32
Mosser v. *Darrow*, 341 U.S. 267 (1951) 21
Pennsylvania Dep't of Pub. Welfare v. *Davenport*, 495 U.S. 552 (1990) 32, 33
Pillowtex, Inc., In re, 304 F.3d 246 (3d Cir. 2002) 42

Cases—Continued: Page

Pro-Snax Distribs., Inc., In re, 157 F.3d 414 (5th Cir. 1998) 10, 15, 16-17, 38
Raleigh v. *Illinois Dep't of Revenue*, 530 U.S. 15 (2000) 33
Schreiber v. *Burlington N., Inc.*, 472 U.S. 1 (1985) 14
Union Bank v. *Wolas*, 502 U.S. 151 (1991) 11, 25
United States v. *Granderson*, 511 U.S. 39 (1994) 12
United States v. *Locke*, 471 U.S. 84 (1985) 11
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) 11, 33
United States Nat'l Bank v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) 11, 12, 13, 14, 22

Statutes, regulation and rule:

Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 12
Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 330, 92 Stat. 2564 8-9
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224, 108 Stat. 4130 9-10
Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 3, 11 U.S.C. 301 *et seq.*:
11 U.S.C. 307 2
11 U.S.C. 323(a) 20, 21, 40
11 U.S.C. 327 ..... 16, 17, 19, 20, 21, 34, 1a
11 U.S.C. 327(a) 3, 7, 35, 36, 37, 43, 1a
11 U.S.C. 327(e) 7, 20, 21, 34, 36, 37, 39, 43, 1a
11 U.S.C. 328(c) 16, 20
11 U.S.C. 329 42
11 U.S.C. 329(a) 42
11 U.S.C. 329(b) 42
11 U.S.C. 330 (1988) 3
11 U.S.C. 330 ..... *passim*
11 U.S.C. 330(a) (1988) 5, 9
11 U.S.C. 330(a) ..... *passim*
11 U.S.C. 330(a)(1) ..... *passim*, 2a
11 U.S.C. 330(a)(1)(A) 15, 16, 2a

Statutes, regulation and rule—Continued: Page

11 U.S.C. 330(a)(4) 19, 3a
11 U.S.C. 330(a)(4)(A) 18, 19, 3a
11 U.S.C. 330(a)(4)(A)(ii) 19, 3a
11 U.S.C. 330(a)(4)(B) ..... *passim*
11 U.S.C. 330(a)(5) 22, 3a
11 U.S.C. 331 ..... 22, 5a
11 U.S.C. 341 40
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 503 8
11 U.S.C. 503(b)(2) 8
11 U.S.C. 507 8
11 U.S.C. 507(a)(1) 8
11 U.S.C. 521(1) 40
11 U.S.C. 521(2) 40
11 U.S.C. 521(3)-(5) 40
11 U.S.C. 521(4) 36, 40
11 U.S.C. 541 ..... 39, 42
11 U.S.C. 541(a)(5) 37
11 U.S.C. 541(a)(6) 37
11 U.S.C. 547(b) 42
Ch. 7, 11 U.S.C. 701 *et seq.* ..... *passim*
11 U.S.C. 701 36
11 U.S.C. 704 6
11 U.S.C. 704(1) 36, 41
11 U.S.C. 704(2) 41
11 U.S.C. 704(5) 41
11 U.S.C. 726 ..... 8, 36, 37
11 U.S.C. 727(b) 36, 37
Ch. 11, 11 U.S.C. 1101 *et seq.* ..... *passim*
11 U.S.C. 1103 ..... 16, 17, 19
11 U.S.C. 1104(a)(1) 37
11 U.S.C. 1104(a)(2) 37
11 U.S.C. 1106 ..... 34, 37, 40
11 U.S.C. 1107 ..... 3, 35, 37
11 U.S.C. 1107(a) 34, 40
11 U.S.C. 1107(b) 34

Statutes, regulation and rule—Continued: Page

11 U.S.C. 1108 40
11 U.S.C. 1112(b) 3
11 U.S.C. 1121(a) 35
11 U.S.C. 1121(b) 35, 37
11 U.S.C. 1121(c) 35
11 U.S.C. 1122-1129 35
Ch. 12, 11 U.S.C. 1201 *et seq.* ..... *passim*
11 U.S.C. 1203 ..... 20, 35
11 U.S.C. 1207(b) 20, 35
11 U.S.C. 1221 ..... 20, 35
Ch. 13, 11 U.S.C. 1301 *et seq.* ..... *passim*
11 U.S.C. 1303 ..... 20, 35
11 U.S.C. 1304 ..... 20, 35
11 U.S.C. 1306(b) 20, 35
11 U.S.C. 1321 ..... 20, 35
11 U.S.C. 1321-1328 26
Pub. L. No. 104-88, § 302, 109 Stat. 943 (1995) 13
Pub. L. No. 104-134, § 101, 110 Stat. 1321-74 (1996) 13
Pub. L. No. 104-193, § 374(a)(1)-(4), 110 Stat. 2255 (1996) 13
Pub. L. No. 105-183, §§ 2-4, 112 Stat. 517-518 (1998) 13
Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998) 13
Pub. L. No. 105-277, § 603, 112 Stat. 2681-886 (1998) 13
Pub. L. No. 106-181, § 744(a) and (b), 114 Stat. 175-176 (2000) 13
Pub. L. No. 106-420, § 4, 114 Stat. 1868 (2000) 13
Pub. L. No. 106-554, § 1(a)(5) [Tit. I § 112(c)], 114 Stat. 2763A-393 to 2763A-396 (2000) 13
Pub. L. No. 107-204, § 803(1)-(3), 116 Stat. 801 (2002) 13
7 U.S.C. 136(hh)(3)(B) 17
11 U.S.C. App. Official Forms 40
8 U.S.C. 1101(a)(27) 17
8 U.S.C. 1324a(b)(1)(B) 17
12 U.S.C. 1715z-14(b) 17
12 U.S.C. 3303(a) 17
15 U.S.C. 78c(a)(34)(G) 17

Statutes, regulation and rule—Continued:

	Page
15 U.S.C. 5201(b)	17
16 U.S.C. 3166(b)(2)	17
16 U.S.C. 3372(a)	17
16 U.S.C. 3911(a)(1)(A)	17
16 U.S.C. 4723(a)(1)(F)	17
18 U.S.C. 1030(a)	17
20 U.S.C. 1091(a)	17
22 U.S.C. 1972	17
22 U.S.C. 2198	17
22 U.S.C. 4802(c)	17
25 U.S.C. 1613a(b)(3)(A)	17
25 U.S.C. 3001(15)	17
26 U.S.C. 6038B(a)	17
28 U.S.C. 581-589	2
28 U.S.C. 586(a)(3)	7, 38
28 U.S.C. 586(a)(3)(A)	30
28 U.S.C. 586(a)(3)(A)(i)	2
28 U.S.C. 586(a)(3)(A)(ii)	2
42 U.S.C. 405(j)(4)(B)	17
42 U.S.C. 415(i)(1)	17
42 U.S.C. 1395bb(a)	17
42 U.S.C. 1395ww(d)(5)(F)(vii)(II)	17
42 U.S.C. 1396a(a)(10)(A)	17
42 U.S.C. 1436a(i)(2)	17
42 U.S.C. 3026(a)	17
42 U.S.C. 5633(a)(3)(E)	17
42 U.S.C. 7651f(a)	17
42 U.S.C. 10138(b)(5)	17
42 U.S.C. 13992	17
42 U.S.C. 14072(a)(3)	17
47 U.S.C. 396(i)(1)	17
28 C.F.R. Pt. 58, App. A	31
Bankr. R.:	
Rule 4002	40
Rule 4002(2)	40
Rule 4002(3)	40

Miscellaneous:

	Page
Administrative Office of the U.S. Courts <http://www.uscourts.gov/Press_Releases/cy02.pdf (tbl. F-2)>	28
Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on the Economy and Commercial Law of the House Comm. on the Judiciary, 103d Cong., 2d Sess. (1994)	28
Stanley B. Bernstein et al., *Collier Compensation, Employment and Appointment of Trustees and Professionals in Bankruptcy* (2001)	39
139 Cong. Rec.:	
p. S2610 (daily ed. Mar. 10, 1993)	23
pp. S2621-S2622 (daily ed. Mar. 10, 1993)	23, 24
p. S2622 (daily ed. Mar. 10, 1933)	24
p. S14,625 (daily ed. Oct. 28, 1993)	24
140 Cong. Rec.:	
p. S4405 (daily ed. Apr. 19, 1994)	24
pp. S4415-S4416 (daily ed. Apr. 19, 1994)	24
p. S4416 (daily ed. Apr. 19, 1994)	19
pp. S4505-S4506 (daily ed. Apr. 20, 1994)	25
p. S4507 (daily ed. Apr. 20, 1994)	25, 26, 30
p. S4646 (daily ed. Apr. 21, 1994)	25
p. S4666 (daily ed. Apr. 21, 1994)	25
pp. S4741-S4742 (daily ed. Apr. 21, 1994)	25
p. S4742 (daily ed. Apr. 21, 1994)	25
p. S14,461 (daily ed. Oct. 6, 1994)	27
p. S14,597 (daily ed. Oct. 7, 1994)	30, 31
p. H10,006 (daily ed. Sept. 28, 1994)	27
p. H10,726 (daily ed. Oct. 4, 1994)	27
p. H10,752 (daily ed. Oct. 4, 1994)	27
pp. H10,758-H10,759 (daily ed. Oct. 4, 1994)	27
p. H10,917 (daily ed. Oct. 5, 1994)	27
p. D418 (daily ed. Apr. 21, 1994)	25
p. D1153 (daily ed. Sept. 28, 1994)	27
p. D1155 (daily ed. Sept. 28, 1994)	27
149 Cong. Rec. (daily ed. Mar. 19, 2003):	
p. D258	14
p. D262	14

Miscellaneous—Continued: Page

Amy L. Good & Dean P. Wyman, *Representing Consumer Debtors: Fiduciary Duties of Counsel*, Prac. Law., Mar. 1999 ..... 39, 40
H.R. 5116, 103d, 2d Sess. (1994) 27, 28, 30
H.R. 120, 105th Cong., 1st Sess. (1997) 13
H.R. 764, 105th Cong., 1st Sess. (1997) 13
H.R. 975, 108th Cong., 1st Sess. (2003) 13-14
H.R. Rep. No. 595, 95th Cong., 2d Sess. (1977) 2
H.R. Rep. No. 835, 103d Cong., 2d Sess. (1994) 30
Karl N. Llewellyn, *The Common Law Tradition* (1960) 15
S. 540, 103d Cong., 1st Sess. (1993) 19, 23, 24, 25, 27, 28, 30
S. 1559, 104th Cong., 2d Sess. (1996) 13
Teresa A. Sullivan et al., *As We Forgive Our Debtors* (1999) 39
David Tatge et al., *Chapter 7 Bankruptcy Trustee's Manual* (1993) 21
Model Rules of Professional Conduct (2002) 43
U.S. Trustee Program, *Mission Statement* <http://www.usdoj.gov/ust/mission.htm> 2
Rosemary E. Williams, *Bankruptcy Practice Handbook* (2d ed. 2002) 39-40

In the Supreme Court of the United States

No. 02-693

JOHN M. LAMIE, PETITIONER

v.

UNITED STATES TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 290 F.3d 739. The opinion of the district court (Pet. App. 15a-27a) is reported at 260 B.R. 273. The opinion of the bankruptcy court (Pet. App. 28a-44a) is reported at 253 B.R. 724.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2002. A petition for rehearing was denied on August 5, 2002 (Pet. App. 45a). A petition for a writ of certiorari was filed on November 4, 2002, and was granted on March 10, 2003. The jurisdiction of this Court rests under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an Appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. United States Trustees supervise the administration of bankruptcy cases and trustees within specified geographic regions. 28 U.S.C. 581-589. "The United States Trustee Program acts in the public interest to promote the efficiency and to protect and preserve the integrity of the bankruptcy system." http://www.usdoj.gov/ust/mission.htm. See H.R. Rep. No. 595, 95th Cong., 2d Sess. 88 (1977) (United States Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena."). Congress provided in the Code that "[t]he United States trustee may raise and may appear and be heard on any issue in any case or proceeding under this Title." 11 U.S.C. 307. Congress also has specifically directed United States Trustees to "review[] * * * applications filed for compensation and reimbursement under section 330 of title 11[] and * * * [to] fil[e] with the court" any "objections to such application." 28 U.S.C. 586(a)(3)(A)(i) and (ii).

2. On December 24, 1998, Equipment Services, Inc., filed a voluntary petition for relief under the debt reorganization provisions of chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* At the time of the filing, the company had retained petitioner, an attorney, to represent it in the bankruptcy proceedings and had given petitioner a $6000 retainer, of which $1000 was used to pay the fees and costs of filing the petition. Petitioner deposited the remaining $5000 in an escrow account, to be drawn upon as petitioner earned fees. On January 26, 1999, the Bankruptcy Court approved

petitioner's employment as the attorney for the debtor-in-possession in the chapter 11 proceeding. Pet. App. 2a, 28a; see 11 U.S.C. 327(a), 1107.

On March 17, 1999, on the motion of the United States Trustee, the proceeding was converted into a case under the liquidation provisions of chapter 7. 11 U.S.C. 1112(b). Petitioner filed an application with the Bankruptcy Court seeking $2325 in attorneys fees, $1325 of which was earned during the chapter 11 proceeding and $1000 of which was earned during the chapter 7 proceeding. The United States Trustee objected to the application to the extent that it requested $1000 in compensation for services rendered after the case was converted to a chapter 7 proceeding. Pet. App. 4a, 15a-17a, 29a.

The Bankruptcy Court held that the Code did not authorize a chapter 7 debtor's attorney to be paid funds from the bankruptcy estate. Pet. App. 30a-38a. The court explained that, before the Code was amended in 1994, 11 U.S.C. 330 (1988) had authorized an award to any debtor's attorney, but Congress in a 1994 amendment to Section 330 deleted the statutory language authorizing such an award. Pet. App. 34a. The court further observed that Congress in 1994 added a separate provision to Section 330 that "provide[s] express authority for payment of counsel to a Chapter 12 or 13 debtor from the estate." Pet. App. 33a (citing 11 U.S.C. 330(a)(4)(B)). The court accordingly concluded that there was no authority to award fees to a chapter 7 debtor's attorney. The Bankruptcy Court nonetheless awarded petitioner fees for services rendered while the case proceeded under chapter 7 because the court concluded that the pre-petition retainer was not, under

state law, property of the bankruptcy estate. *Id.* at 38a-43a.[1]

The district court affirmed. Pet. App. 15a-26a. The court concluded that Section 330(a)(1) was "plain" in not authorizing fees to a chapter 7 debtor's attorney. *Id.* at 22a, 24a. The district court nonetheless agreed with the bankruptcy court's conclusion that, under state law, the retainer was not property of the estate and accordingly that petitioner was entitled to draw from the retainer fees earned during the chapter 7 proceeding. *Id.* at 25a-26a.

3. A divided panel of the court of appeals affirmed the district court's construction of Section 330, but the panel unanimously reversed the district court's conclusion that the retainer was not property of the bankruptcy estate. Pet. App. 1a-14a. The court of appeals held that Section 330(a) does not authorize a chapter 7 debtor's attorney to be compensated from the estate. *Id.* at 5a-9a. The court of appeals reasoned that "§ 330(a), as revised in 1994, omits the phrase 'or the debtor's attorney' from the list of persons to whom a court may award 'reasonable compensation' from the bankruptcy estate for services rendered in a Chapter 7 proceeding." *Id.* at 6a. The court concluded that it "should follow the plain language of the 1994 version of § 330(a), particularly because application of that plain language supports a reasonable interpretation of the Bankruptcy Code." *Id.* at 8a.

Judge Michael dissented from the court's holding that Section 330 did not authorize the award of fees to a

[1] On July 10, 2000, the Bankruptcy Court had separately approved petitioner's application for $1325 in fees earned for services rendered while he represented the company in its capacity as a debtor-in-possession under chapter 11. Pet. App. 29a n.18.

chapter 7 debtor's attorney. Pet. App. 13a-14a. In his view, the deletion of the phrase "or to the debtor's attorney" from the statute was a "drafting error" subject to correction by the court. *Id.* at 13a.

SUMMARY OF ARGUMENT

A. The 1994 amendments to Section 330 removed "the debtor's attorney" from the list of eligible individuals entitled to receive compensation. The current version of Section 330 thus contains no statutory authority to use estate funds to compensate a chapter 7 debtor's attorney. The judgment of the court of appeals therefore must be affirmed unless petitioner meets the heavy burden of showing that the omission of the phrase "or the debtor's attorney" from the statute is unquestionably a scrivener's error that produces absurd results.

B. Petitioner fails to demonstrate beyond question that Congress's omission was an accident, much less one that, if not corrected, would produce results that Congress could not have rationally intended. The statutory context indicates that Congress purposefully omitted the phrase "or the debtor's attorney" from Section 330. The omission is the most direct and obvious means to eliminate the authority to pay debtors' attorneys out of estate funds held for the benefit of creditors. Moreover, while the 1994 amendments to 11 U.S.C. 330(a) (1988) omitted the phrase "or the debtor's attorney," the amendments enacted a new provision authorizing only attorneys for individual chapter 12 or 13 debtors to be paid fees from the estate. 11 U.S.C. 330(a)(4)(B). Congress's simultaneous denial of similar authorization for attorneys for chapter 7 debtors reflects deliberate action on the part of Congress.

C. The legislative history also is consistent with the conclusion that Congress intentionally omitted the phrase "or the debtor's attorney" from Section 330(a)(1). The phrase was deleted in the same amendment that added the authorization in Section 330(a)(4)(B) for estate fees to be paid solely to attorneys for chapter 12 or 13 debtors. Furthermore, the members of Congress had over five months before final enactment in which to read and consider the text of the Senate bill that had deleted the phrase "or the debtor's attorney" from Section 330(a). In that intervening period, the deletion of the phrase was brought to the attention of Congress by an organization of debtors' attorneys who expressed no objection to the deletion, and Congress thereafter left the provision unchanged.

D. Enforcing the statute as written serves legitimate and substantial policy objectives. Unlike proceedings under chapters 11, 12, and 13, in which the debtor is responsible for developing repayment plans for the benefit of creditors, a proceeding under chapter 7 involves liquidation of the estate by a trustee. 11 U.S.C. 704. Chapter 7 is a zero-sum game in which any funds diverted from the estate to pay attorneys reduce the amount of funds available to pay creditors. Congress therefore quite rationally could have determined to preserve chapter 7 estate funds for the benefit of creditors.

At the same time, denial of estate funds to pay a chapter 7 debtor's attorney is entirely consistent with the orderly administration and liquidation of chapter 7 estates. Such denial does not affect the 96% of all chapter 7 cases in which there are no funds available in the estate to pay counsel (or creditors, for that matter). Moreover, where funds *are* available, the Code gives

the trustee the power to seek court approval to hire counsel, including the debtor's counsel, where appropriate and in the best interest of the estate. 11 U.S.C. 327(a) and (e). Chapter 7 debtors play very little role in the administration of the estate and are therefore given no similar statutory authority to retain counsel to assist the administration of the estate. Finally, regardless of the size of the estate, a chapter 7 debtor who retains counsel for the debtor's personal benefit may compensate counsel by giving counsel a pre-petition flat fee, by using his post-petition income, or both. For those reasons, the United States Trustees, who are charged with supervising the administration of bankruptcy cases, 28 U.S.C. 586(a)(3), view enforcing Section 330(a)(1) as written as furthering the proper administration of chapter 7 estates.

ARGUMENT

SECTION 330 DOES NOT AUTHORIZE THE USE OF ESTATE FUNDS TO COMPENSATE A CHAPTER 7 DEBTOR'S ATTORNEY

The court of appeals correctly concluded that Section 330(a)(1) is plain on its face in not authorizing compensation to the debtor's attorney in a chapter 7 case. The statutory context, history, and purposes are consistent with the view that Congress intentionally omitted the phrase "or the debtor's attorney" from the statute. Finally, because the statute as written creates a sensible statutory scheme, there is no warrant for petitioner's claim that the Court should rewrite the Code.

A. The Plain Text Of Section 330(a)(1) Does Not Authorize Estate Funds To Be Paid To A Chapter 7 Debtor's Attorney

1. The assets of a chapter 7 estate must be distributed pursuant to the priority provisions of the Code. 11 U.S.C. 503, 507, 726. The Code gives priority to administrative expenses, 11 U.S.C. 507(a)(1), and permits "compensation and reimbursement awarded under section 330(a)" to be treated as an administrative expense, 11 U.S.C. 503(b)(2). *In re Milwaukee Engraving Co.*, 219 F.3d 635, 636-637 (7th Cir. 2000); *F/S Airlease II, Inc.* v. *Simon*, 844 F.2d 99, 108-109 (3d Cir.), cert. denied, 488 U.S. 852 (1988). Petitioner in this case sought such priority treatment in applying for compensation out of the funds of the chapter 7 estate under Section 330(a) for services performed during the chapter 7 proceeding. Pet. App. 2a.

The 1994 amendments to Section 330(a), however, compel the conclusion that the Code does not authorize estate funds to be awarded to a chapter 7 debtor's attorney. As originally enacted in the Bankruptcy Reform Act of 1978, Section 330(a), entitled "Compensation of officers," provided that:

> After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*—
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney, as the case may be, and by any paraprofessional persons

> employed by such trustee, professional person, or attorney, as the case may be, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services, other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 330, 92 Stat. 2564 (11 U.S.C. 330(a) (1988)) (emphasis added). In the Bankruptcy Reform Act of 1994, Congress substantially revised Section 330(a) to provide in relevant part:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.
>
> * * * * *
>
> (4) * * * (B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case

> based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 224, 108 Stat. 4130 (11 U.S.C. 330(a)(1) and (4)(B)).

Thus, the prior version of Section 330(a) authorized compensation to "a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney." By contrast, the statute as revised permits an award of compensation to only "a trustee," "an examiner," and "a professional person employed under section 327 or 1103." 11 U.S.C. 330(a)(1). Section 330(a)(1) thus unambiguously "excludes attorneys from its catalog of professional officers of a bankruptcy estate who may be compensated for their work." *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414, 425 (5th Cir. 1998). Section 330(a)(1) is accordingly "clear textually on its face" in not providing statutory authority to compensate any debtor's attorney from funds of the estate. *In re Am. Steel Prod., Inc.*, 197 F.3d 1354, 1356 (11th Cir. 1999); *In re Century Cleaning Servs., Inc.*, 195 F.3d 1053, 1061 (9th Cir. 1999) (Thomas, J., dissenting) ("The plain language of § 330(a) is not ambiguous: it precludes an award of attorney's fees to Chapter 7 debtors' attorneys from the bankruptcy estate.").

2. Given the complete absence of any statutory authority to compensate a chapter 7 debtor's attorney, petitioner argues that Section 330(a)(1) should be judicially revised to include the phrase "or the debtor's attorney." In petitioner's view (Pet. Br. 16, 28), the absence of that phrase reflects a "scrivener's error" caused by a "slip of the pen" of a drafter who deleted the phrase during the 1994 amendments to Section

330(a). See *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1060 (Reinhardt, J.). What petitioner requests, however, "is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Iselin* v. *United States*, 270 U.S. 245, 251 (1926). This Court, however, does not have "*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Ibid.* (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)). That conclusion is compelled out of "deference to the supremacy of the Legislature, as well as recognition that Congressman typically vote on the language of a bill." *Ibid.*

Accordingly, when "the statute's language is plain, 'the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Hartford Underwriters Ins.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). In other words, when the "result the text produces is not necessarily absurd, [it] cannot be dismissed as an obvious drafting error." *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989); see *Union Bank* v. *Wolas*, 502 U.S. 151, 163 (1991) (Scalia, J., concurring) (A scrivener's error is one that "produc[es] an absurd result.").

This Court found a scrivener's error subject to judicial correction in *United States National Bank* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993). In that decision, the Court disregarded

quotation marks appearing in the Act of Sept. 7, 1916, ch. 461, 39 Stat. 753, and held that "the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design." 508 U.S. at 462. The Court invoked the settled rule permitting courts to "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute." *Ibid.* (quoting *Hammock* v. *Loan & Trust Co.*, 105 U.S. 77, 84-85 (1881)). The Court also found that, based on "*overwhelming evidence* from the structure, language, and subject matter of the 1916 Act," "[t]he true meaning of the 1916 Act is *clear beyond question*." *Ibid.* (emphasis added).

Petitioner here requests a significant extension of that decision. Petitioner seeks not to repunctuate the statute, or, indeed, to interpret any particular statutory text. Rather, he seeks to insert an entire phrase that is conspicuously missing from the Code in order to create a substantive authorization for chapter 7 debtors' attorneys to be given priority over creditors in the distribution of estate assets. Accordingly, even if there were some basis for petitioner's claim of a drafting error in removing the phrase "or the debtor's attorney" —which there is not—the relief petitioner seeks would be impermissible. As this Court stated in *Iselin*, 270 U.S. at 251, "[t]o supply omissions transcends the judicial function." See also *United States* v. *Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think * * * is the preferred result."). In her concurring opinion in *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 142 (1995), Justice Ginsburg similarly

observed that "[c]orrecting a scrivener's error is within this Court's competence, see, *e.g.*, [*United States Nat'l Bank*, *supra*], but only Congress can correct larger oversights of the kind presented by the OWCP Director's petition," *i.e.*, Congress's failure to confer standing on the Director when it amended the statute at issue.

There is particular reason for the Court to hesitate here before embarking on the judicial creation of a substantive right for all debtors' attorneys to seek compensation from the bankruptcy estate. Congress has shown considerable willingness to amend the Bankruptcy Code in order to correct perceived flaws or achieve policy goals, and in fact has done so many times since 1994 without choosing to insert language authorizing the use of chapter 7 estates to pay debtors' lawyers.[2]

Indeed, far from acting to authorize such payments, Congress has specifically declined to pass three bills that would have added the phrase "or the debtor's attorney" to Section 330(a)(1). H.R. 120, 105th Cong., 1st Sess. § 7 (Jan. 7, 1997); H.R. 764, 105th Cong., 1st Sess. § 7 (Nov. 13, 1997); S. 1559, 104th Cong., 2d Sess. § 4 (Aug. 2, 1996). Similarly, the current bankruptcy reform bill passed by the House would amend Section 330(a)(1) without reinserting the phrase "or the debtor's attorney." H.R. 975, 108th Cong., 1st Sess.

---

[2] Pub. L. No. 107-204, § 803(1)-(3), 116 Stat. 801 (2002); Pub. L. No. 106-554, § 1(a)(5) [Tit. I § 112(c)], 114 Stat. 2763A-393 to 2763A-396 (2000); Pub. L. No. 106-420, § 4, 114 Stat. 1868 (2000); Pub. L. No. 106-181, § 744(a) and (b), 114 Stat. 175-176 (2000); Pub. L. No. 105-277, § 603, 112 Stat. 2681-886 (1998); Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998); Pub. L. No. 105-183, §§ 2-4, 112 Stat. 517-518 (1998); Pub. L. No. 104-193, § 374(a)(1)-(4), 110 Stat. 2255 (1996); Pub. L. No. 104-134, § 101, 110 Stat. 1321-74 (1996); Pub. L. No. 104-88, § 302, 109 Stat. 943 (1995).

§§ 332(b), 333 (Mar. 19, 2003); 149 Cong. Rec. D258, D262 (daily ed. Mar. 19, 2003). In short, "[t]he current version of § 330(a) has been in force now for eight years and Congress has not elected to recognize that it made a scrivener's error when it amended the statute in 1994." Pet. App. 9a. While such subsequent legislative history may be a suspect interpretive tool in other contexts, it is a significant obstacle to petitioner's ability to carry the burden of showing that the text of Section 330(a) can only be explained as a scrivener's error. Accordingly, at least in the absence of "overwhelming evidence" demonstrating "beyond question" (*United States Nat'l Bank*, 508 U.S. at 462) that Congress could not have intended to remove the phrase "or the debtor's attorney" from Section 330(a), the statutory text must be enforced as written.

B. The Statutory Context Is Consistent With Congress's Intentional Deletion Of The Phrase "Or The Debtor's Attorney"

1. The starting point in discerning congressional intent is, of course, the text of the statute. *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999); *Schreiber* v. *Burlington N., Inc.*, 472 U.S. 1, 5 (1985). "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. * * * [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). That presumption should apply in this case. The most efficient and direct way to eliminate compensation for debtors' attorneys was the precise course that Congress chose here, *i.e.*, the deletion of "the debtor's attorney" from the list of eligible officers entitled to receive compensation under Section

330(a)(1). "[B]y deleting 'to the debtor's attorney' from the statute, Congress has clearly indicated that the debtor's attorney may not be compensated from the estate." *In re Pro-Snax Distribs., Inc.*, 157 F.3d at 425.

Petitioner contends (Pet. Br. 4, 17, 20, 25) that the omission of the phrase "or the debtor's attorney" reflects a scrivener's error because, while Section 330(a)(1) excludes the debtor's attorney from the list of eligible officers entitled to receive compensation, Section 330(a)(1)(A) permits an award of "reasonable compensation for * * * services rendered by the trustee, examiner, professional person, or *attorney*." The most logical explanation for the "attorney" reference, however, is that Congress failed to make corresponding changes to the parts of Section 330(a)(1)(A) that were affected by Congress's deliberate removal of the phrase "or the debtor's attorney" from Section 330(a)(1). Cf. *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001) ("The canon requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute.'") (quoting Karl Llewellyn, *The Common Law Tradition* 525 (1960)). Making that corresponding change might have resulted in a cleaner text, but the fact remains that omitting the critical, operative reference to "the debtor's attorney" was the most direct and efficient way to implement the change.

More importantly, the reference to "attorney" in Section 330(a)(1)(A) does not render the statute unenforceable as written. As discussed, Section 330(a)(1) permits the court to award fees to "a professional person employed under section 327 or 1103." 11 U.S.C. 330(a)(1). The Code expressly contemplates that the phrase "a professional person" encompasses an attorney em-

ployed by the trustee under Section 327 or by chapter 11 creditor committees under Section 1103. 11 U.S.C. 327, 328(c), 1103. Accordingly, as the court of appeals explained, the phrase "a professional person employed under section 327 or 1103 could be the antecedent to 'attorney' as used in § 330(a)(1)(A), because the Trustee is authorized to hire an attorney as a professional person." Pet. App. 8a (citation omitted). Although "the reference in § 330(a)(1)(A) to 'attorney' may be superfluous," *id.* at 9a, it is not "necessarily absurd," *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. at 134, and therefore does not justify judicial reinsertion of language that Congress unambiguously omitted.[3]

For similar reasons, petitioner errs in relying (Pet. Br. 4, 14, 20) on the fact that Section 330(a)(1) contains a grammatical error: there is a missing "or" between the phrases "an examiner" and "a professional person." The omission of a conjunction, however, "is an oversight that is as consistent with the *deliberate* deletion of the words 'debtor's attorney' as it is with the inadvertent deletion of those words from that section." Pet. App. 9a. The absence of a conjunction also does not affect the substance or application of the text because "[the] omission does not change the meaning of the words around it." *In re Pro-Snax Distribs., Inc.*, 157 F.3d at

[3] Petitioner mistakenly suggests (Pet. Br. 18-19) that the reference to "attorney" in Section 330(a)(1)(A) "literal[ly]" authorizes an award of fees to a chapter 7 debtor's attorney. As petitioner elsewhere concedes (Pet. Br. 4), Section 330(a)(1)(A) merely lists "parties that provide compensable services" (including paraprofessional persons), while Section 330(a)(1) "identifies persons who may be paid compensation." Thus, only persons who are included in the latter provision may be awarded compensation from the estate; chapter 7 debtors' attorneys are notably absent from that provision.

425 n.14. "Indeed, all that the omission would signify to a reader unfamiliar with the pre-1994 statute is the typographical deletion of 'or' before the phrase 'a professional person.'" *Ibid.* Such a missing conjunction is not uncommon. The United States Code is replete with such instances.[4]

2. The structure of Section 330(a) is also consistent with Congress's intentional exclusion of the previously existing authority to compensate a chapter 7 debtor's attorney. At the same time that Congress enacted Section 330(a)(1) to limit fee awards to trustees, examiners, and professional persons employed under Sections 327 and 1103, Congress added Section 330(a)(4)(B) to authorize compensation to a limited class of debtor's attorneys. Section 330(a)(4)(B) provides that "*[i]n a chapter 12 or 13 case* in which the debtor is an individual, the court *may allow* reasonable compensation to *the debtor's attorney* for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set

[4] *E.g.*, 7 U.S.C. 136(hh)(3)(B); 8 U.S.C. 1101(a)(27); 8 U.S.C. 1324a(b)(1)(B); 12 U.S.C. 1715z-14(b); 12 U.S.C. 3303(a); 15 U.S.C. 78c(a)(34)(G); 15 U.S.C. 5201(b); 16 U.S.C. 3166(b)(2); 16 U.S.C. 3372(a); 16 U.S.C. 3911(a)(1)(A); 16 U.S.C. 4723(a)(1)(F); 18 U.S.C. 1030(a); 20 U.S.C. 1091(a); 22 U.S.C. 1972; 22 U.S.C. 2198; 22 U.S.C. 4802(c); 25 U.S.C. 1613a(b)(3)(A); 25 U.S.C. 3001(15); 26 U.S.C. 6038B(a); 42 U.S.C. 405(j)(4)(B); 42 U.S.C. 415(i)(1); 42 U.S.C. 1395bb(a); 42 U.S.C. 1395ww(d)(5)(F)(vii)(II); 42 U.S.C. 1396a(a)(10)(A); 42 U.S.C. 1436a(i)(2); 42 U.S.C. 3026(a); 42 U.S.C. 5633(a)(3)(E); 42 U.S.C. 7651f(a); 42 U.S.C. 10138(b)(5); 42 U.S.C. 13992; 42 U.S.C. 14072(a)(3); 47 U.S.C. 396(i)(1).

forth in [Section 330(a)]." 11 U.S.C. 330(a)(4)(B) (emphasis added).[5]

If Congress had intended to permit compensation for chapter 7 debtors' attorneys, it naturally would have included them in Section 330(a)(4)(B), which "allow[s]" a court to award fees to a debtor's attorney, but only in cases under chapters 12 and 13. "Thus, although Chapter 12 and Chapter 13 debtors' attorneys were also affected by the amendment to § 330(a), Congress specifically added a mechanism providing for their compensation." *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1062 (Thomas, J., dissenting). "The inclusion of Chapter 12 and Chapter 13 debtors' attorneys in a new section of the statute, coupled with the omission of 'debtor's attorney' from the general section, lends support to the conclusion that the choice was deliberate under the statutory construction principle of *expressio unius est exclusio alterius*." *Ibid.*

Petitioner is also wrong in arguing (Pet. Br. 23) that Section 330(a) necessarily contemplates compensation to all debtors' attorneys because Section 330(a)(4)(B) permits the compensation of attorneys for chapter 12 and 13 debtors under a standard that is an "exception" to the general standards set forth in Section 330(a)(4)(A). The authority to compensate those attorneys does not depend on an interpretation of the statute that would authorize compensation of all debtors' attorneys. Section 330(a)(4)(B) *itself* authorizes estate funds to be awarded to attorneys for chapter 12

[5] Chapter 13 allows individuals with regular income to satisfy their debts through a repayment plan. 11 U.S.C. 1301 *et seq.* Chapter 12 similarly allows family farmers with regular annual income to satisfy their debts through a repayment plan. 11 U.S.C. 1201 *et seq.*

and 13 debtors by providing that the court "may allow" reasonable compensation to those attorneys based on a consideration of the benefit to the chapter 12 or 13 debtor and "the other factors set forth in this section." Section 330(a)(4)(B) also by its own terms makes applicable to requests for compensation by chapter 12 and 13 debtors' attorneys the factors that the court considers in awarding fees to those seeking compensation under 11 U.S.C. 330(a)(1), *i.e.*, trustees, examiners, and professional persons employed under Sections 327 and 1103.

Among those factors is the prohibition in Section 330(a)(4)(A) that bars compensation if the services were not "reasonably likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. 330(a)(4)(A)(ii). Thus, the "[e]xcept as provided in subparagraph (B)" clause at the beginning of Section 330(a)(4)(A) authorizes the court to award fees to a chapter 12 or 13 debtor's attorney under "subparagraph (B)," even where the services do not benefit the estate, as long as the services benefit the *debtor*. That reading is consistent with the provision's history, which shows that Section 330(a)(4) was derived from a previous version of S. 540, 103d Cong., 1st Sess. (1993), which, before it was limited to chapter 12 and 13 debtors, would have provided that, "[i]n a case in which the debtor is an individual, the court shall allow reasonable compensation for services by the debtor's attorney representing the interests of the debtor without regard to the benefit of such services to the estate." 140 Cong. Rec. S4416 (daily ed. Apr. 19, 1994); see p. 24, *infra*. Accordingly, construing Section 330(a) in accordance with its text yields no interpretive difficulties and is consistent with the legislative evolution of the 1994 amendments.

Petitioner similarly errs in arguing (Pet. Br. 24) that, because Section 330(a)(4)(B) applies when the attorney represents the chapter 12 or 13 *debtor*, there must be some other authorization in Section 330(a)(1) to compensate such an attorney when he "represent[s] the interests of *the debtor's estate*." *Trustees*, not chapter 7 debtors or debtors' attorneys, represent the estate. 11 U.S.C. 323(a). Section 330(a)(4)(B) moreover permits a chapter 12 or 13 debtor's attorney to be compensated for representing *the debtor* when his services benefit the debtor as well as the estate. 11 U.S.C. 330(a)(4)(B). Such a benefit typically occurs in chapter 12 and 13 under which the debtor proposes a repayment plan and remains in possession of all property of the estate. 11 U.S.C. 1203, 1207(b), 1221, 1303, 1304, 1306(b), 1321. No similar circumstances are present under chapter 7. See pp. 35-36, *infra*.

3. Petitioner's reading of Section 330(a)(1) should also be rejected because it would circumvent a specific provision in the Code that addresses the circumstances under which the debtor's attorney may be compensated for services that benefit the estate. As discussed, Section 330(a)(1) permits a court to award compensation to individuals, including attorneys, retained by the trustee as professional persons under Section 327. 11 U.S.C. 327, 328(c), 330(a)(1). In particular, Section 327(e) permits "[t]he trustee, with the court's approval, [to] employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such an attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." 11 U.S.C. 327(e). Section 327(e) thus explicitly entrusts the trustee, a fiduciary

who represents the estate on behalf of creditors (11 U.S.C. 323(a); *Mosser* v. *Darrow*, 341 U.S. 267, 271 (1951)), with the responsibility of determining when to hire a former debtor's counsel, and the Code permits such retention only if a court concludes that counsel does not have a conflict of interest and his services serve a special purpose and further the best interests of the estate.[6]

Under petitioner's reading of the statute, however, a chapter 7 debtor's counsel would be able to bypass altogether the provisions of Section 327(e) while still obtaining compensation from the estate. Petitioner freely admits (Pet. Br. 32) that Section 327 is unsatisfactory from his perspective, because retention under Section 327 is "sufficiently uncertain—including because the choice would be left to the trustee and because the debtor's counsel may be deemed to have a preclusive conflict of interest." This Court should reject an interpretation that would usurp the trustee's authority under Section 327(e) to determine whether counsel's services are necessary, and that would permit counsel with a conflict to seek compensation under Section 330(a).[7]

---

[6] In the United States Trustees' experience, trustees usually retain special counsel to litigate claims made against and on behalf of the estate. See also David Tatge et al., *Chapter 7 Bankruptcy Trustee's Manual* § 4.28 (1993).

[7] As discussed, the Code expressly permits chapter 12 and 13 debtors' counsel to seek fees from the estate. Moreover, because chapter 12 and 13 debtors remain in possession of the estate, see p. 20, *supra*, and chapter 12 and 13 trustees do not collect and reduce to money the property of the estate, 11 U.S.C. 1202(b)(1) and 1302(b)(1), counsel's services for the chapter 12 and 13 debtor with respect to claims made against and on behalf of the estate would not usurp the trustee's role under Section 327(e).

4. Petitioner also relies (Pet. Br. 24-25) on Section 330(a)(5)'s direction to courts to reduce a final award of professional fees by any interim compensation awarded under 11 U.S.C. 331, which provides for interim compensation to, *inter alia*, "a debtor's attorney." Petitioner's argument lacks merit. Section 331 provides that various persons, including "a debtor's attorney," "may apply to the court * * * for such compensation for services * * * or reimbursement for expenses * * * *as is provided under section 330 of this title.*" 11 U.S.C. 331 (emphasis added). The authority to award interim compensation under Section 331 is thus expressly tied to the authority of the court to award final compensation under Section 330. Read together, Sections 330(a)(5) and 331 provide that debtors' attorneys who are authorized under Section 330 to seek compensation, *i.e.*, attorneys for debtors in chapter 12 and 13, may seek an interim award of fees to be credited in the final award of compensation. That straightforward result provides no support for petitioner's counter-textual interpretation of the statute.

C. The Legislative History Is Consistent With An Intentional Deletion Of The Phrase "Or The Debtor's Attorney"

Petitioner places heavy reliance (Pet. Br. 18, 25-30) on the legislative history of the 1994 amendments to Section 330 in attempting to show that Congress inadvertently deleted the phrase "or the debtor's attorney" from the statute. The history, however, is consistent with an intentional deletion of the phrase, and thus does not demonstrate "beyond question" (*United States Nat'l Bank*, 508 U.S. at 462) that the deletion was inadvertent.

1. The revised version of Section 330 originated as Section 309 of a Senate bill, S. 540, 103d Cong., 1st Sess., which was introduced in the Senate on March 10, 1993, and referred to the Committee on the Judiciary. 139 Cong. Rec. S2610, S2621-2622 (daily ed. Mar. 10, 1993). Section 309 originally did not diminish the existing right of any debtor's attorney to seek fees but, *inter alia*, deleted the phrase "of this title" from the original 1978 Act and added new language requiring consideration of the views of the United States Trustees:

> **Section 309. Professional Fees.**
>
> Section 330(a) of title 11, United States Code, is amended to read as follows:
>
> "(a)(1) After notice to the parties in interest and the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, or the debtor's attorney, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28—
>
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and
>
> (B) reimbursement for actual, necessary expenses.

139 Cong. Rec. at S2621-S2622. That version of the bill also set forth new criteria for awarding compensation in a new provision, Section 330(a)(2), and added another provision, Section 330(a)(3), which provided that "[t]he court shall not allow compensation for duplication of services or for services that are not either reasonably likely to benefit the debtor's estate or necessary in the administration of the case." *Id.* at S2622.

On October 28, 1993, the Judiciary Committee reported S. 540 to the Senate with a new provision, Section 330(a)(3)(B), which would have provided that, "[i]n a case in which the debtor is an individual, the court shall allow reasonable compensation for services *by the debtor's attorney* representing the interests of the debtor without regard to the benefit of such services to the estate." S. 540, 103d Cong., 1st Sess. (1993) (emphasis added); 139 Cong. Rec. S14,625 (daily ed. Oct. 28, 1993).

On April 19, 1994, S. 540 was brought before the Senate for debate. 140 Cong. Rec. at S4405, S4415-4416. On April 20, 1994, the day before the phrase "or the debtor's attorney" was deleted from the bill, Senator Heflin explained that Section 309 of S. 540 was being revised in order to encourage debtors to file for bankruptcy protection under chapter 13:

> During the course of our hearings, it became very apparent that chapter 13 is often the best overall process for debtors, creditors, and the national economy. Numerous bankruptcy judges have indicated that most individuals want to pay their debts in a manner similar to the program offered under chapter 13 of this code. Unfortunately, the use of this chapter is not widespread throughout the country, and many people are simply not informed that this

> option is available when they seek the Bankruptcy Code's protection. This title contains many provisions that take into account these concerns.

140 Cong. Rec. S4507 (daily ed. Apr. 20, 1994); accord *id.* at S4505, S4506.

The following day, Senator Heflin, on behalf of Senator Metzenbaum, introduced Amendment No. 1645, which revised Section 330 with language identical to that ultimately adopted by Congress later that year. 140 Cong. Rec. S4741-S4742 (daily ed. Apr. 21, 1994); *id.* at S4646. The Senate unanimously passed the bill the same day. *Id.* at S4666, D418.

Amendment No. 1645 is consistent with deliberate action by Congress in important respects. The amendment both deleted the phrase "or the debtor's attorney" from the committee's version of Section 330(a)(1) and simultaneously authorized in Section 330(a)(4)(B) compensation solely to attorneys for chapter 12 and 13 debtors. 140 Cong. Rec. at S4741-S4742. Not only is petitioner factually wrong in asserting (Pet. Br. 25) that the 1994 amendments to Section 330 contained no "substantive" change, but rather, "the fact that Congress carefully reexamined and entirely rewrote the * * * provision * * * supports the conclusion that the text * * * as enacted reflects the deliberate choice of Congress." *Union Bank* v. *Wolas*, 502 U.S. at 160.

Other features of the amendment also signal a deliberate intent to preclude chapter 7 debtors' attorneys from seeking compensation out of estate funds. In addition to deleting the authority to compensate all debtors' attorneys from Section 330(a)(1), the amendment accomplished a similar result by deleting the language in the committee's version of the bill that

would have authorized compensation for *any* individual debtor's attorney, including an individual chapter 7 debtor's attorney, when the services were necessary and beneficial to the debtor. In light of the concerns expressed by Senator Heflin, Amendment No. 1645 replaced the committee's language with a new provision, Section 330(a)(4)(B), which authorized compensation solely to attorneys for individual debtors in chapters 12 and 13. That elimination of authority to compensate attorneys for individual chapter 7 debtors was undoubtedly intentional, and it supports the conclusion that Congress acted with similar intent in deleting the authority to compensate such debtors' attorneys in Section 330(a)(1).

Likewise, the deletion of the phrase "or the debtors' attorney" from Section 330(a) comports with the view of the amendment's sponsor, Senator Metzenbaum, that "chapter 13 is often the best overall process for debtors, creditors, and the national economy," 140 Cong. Rec. at S4507, presumably because chapter 13 enlarges the sources of repayment to creditors by drawing upon post-petition income to fund a repayment plan, 11 U.S.C. 1321-1328. By making available estate funds to compensate only chapter 12 and 13 debtors' attorneys, the 1994 amendments provided an incentive for debtors' attorneys to educate their clients about the potential advantages to the debtor of a chapter 13 bankruptcy petition, rather than a chapter 7 liquidation. Given the concern that "[u]nfortunately, the use of this chapter [13] is not widespread throughout the country, and many people are simply not informed that this option is available when they seek the Bankruptcy Code's protection," 140 Cong. Rec. at S4507, Congress rationally could have sought to remedy this perceived problem and to encourage the use of chapter 13 by precluding debtors' attorneys from seeking compensation from chapter 7 estates.

2. The events following the Senate's passage of Amendment No. 1645 further suggest that the members of Congress were aware of the text of the legislation that they enacted. As an initial matter, the members of Congress had *over five additional months* to read and consider Amendment No. 1645 before final passage of the legislation as H.R. 5116 by the House on October 5, 1994 (140 Cong. Rec. at H10,917), and by the Senate on October 6, 1994 (*id.* at S14,461).[8] During that intervening period, moreover, the deletion of the phrase "or the debtor's attorney" was specifically brought to Congress's attention.

On August 17, 1994, three months after the Senate passed Amendment No. 1645, the House Subcommittee on Economic and Commercial Law held hearings on bankruptcy reform. Among the written materials submitted to the committee for the hearing was a statement by National Association of Consumer Bankruptcy Attorneys (NACBA). The NACBA is "the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bank-

---

[8] Although the House held hearings on bankruptcy reform in August 1994, no bankruptcy reform bill was apparently formally introduced in the House until September 28, 1994, when H.R. 5116 was introduced and referred to the Committee on the Judiciary without any amendment to Section 330. 140 Cong. Rec. D1153, D1155 (daily ed. Sept. 28, 1994); *id.* at H10,006. The House Committee on the Judiciary reported H.R. 5116 to the House on October 4, also without amendment to Section 330. 140 Cong. Rec. at H10,726. The same day H.R. 5116 was amended to include, among other things, a revised Section 330 with language conforming to S. 540 as passed by the Senate. *Id.* at H10,752, H10,758-10,759.

ruptcy debtors," NACBA Pet. Am. Br. 2, a class that comprises approximately 98% of all chapter 7 debtors <http://www.uscourts.gov/Press_Releases/cy02. pdf (table F-2)>. In analyzing S. 540, the NACBA informed the members of the Committee that the provision regarding professional fees

> appears to have some minor drafting errors, including the apparently inadvertent *removal of debtors' attorneys* from the list of professionals whose compensation awards are covered by section 330(a).
>
> *NACBA does not oppose this provision, since it contains language ensuring that chapter 12 and 13 individual debtors' attorneys may be awarded compensation* for their work in protecting the debtor's interests in a bankruptcy case.

Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on the Economy and Commercial Law of the House Comm. on the Judiciary, 103d Cong., 2d Sess. 551 (1994) (emphasis added). "Despite having the specific impact of the Senate bill on Chapter 7 debtors' attorneys called to its attention, the House of Representatives passed House Bill 5116, which included the text of § 330 as passed by the Senate." *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1063 (Thomas, J., dissenting).

The NACBA's testimony is the *only* direct evidence relating to petitioner's assertion of a scrivener's error, and it is in clear tension with petitioner's theory. It shows that Congress was affirmatively notified of both the deletion of the phrase "or the debtor's attorney" and the lack of any objection to the deletion, and Congress passed the statute as written. That sequence

of events makes it highly unlikely that the deletion was a mere accident, and the NACBA's outright acquiescence in the provision certainly renders it difficult to conclude that a rational Congress could not have deleted the phrase "or the debtor's attorney" from the statute. Petitioner's retort is that, even were members of Congress "aware of this snippet, they likely agreed with its conclusion that the omission was inadvertent." Pet. Br. 29. Acceptance of that contention, however, would turn the doctrine of scrivener's error on its head, since it would permit statutory amendment by judicial fiat even where Congress *consciously* enacts the words of a statute.

3. Petitioner argues (Pet. Br. 14, 18, 25-28) that Congress deleted the phrase "or the debtor's attorney" only as a "last minute" addition to the Bankruptcy Reform Act of 1994, and did so inadvertently when the statute's drafter removed the phrases appearing immediately before and after the phrase "or the debtor's attorney." As demonstrated above, the Senate had engaged in over a year of deliberations leading up to its passage of S. 540 as revised by Amendment No. 1645, *i.e.* from March 10, 1993 until April 21, 1994. Congress also had an additional five months to review the text of the Senate bill before passage of the final legislation in October 1994 and, in the intervening period, the House was explicitly notified of the omission of the phrase "or the debtor's attorney." See pp. 27-28, *supra*. Thus, the deletion of the phrase "or the debtor's attorney" was the product of a lengthy deliberative process. And in any event, there is no principle of law that deprives a "last minute" statutory change to a bill of its statutory force and effect, or that makes such a change less likely to reflect a deliberate choice by the members of Congress.

Contrary to petitioner's theory, moreover, Amendment No. 1645 made *no* change to the words that appeared immediately before the phrase "or the debtor's attorney." Rather, the phrase "of this title," which had appeared immediately before the phrase "or to the debtor's attorney" in Section 330 of the Bankruptcy Reform Act of 1978, was deleted by the original version of S. 540 that was introduced in the Senate on March 10, 1993, a full year before Amendment No. 1645 removed the phrase "or the debtor's attorney." See p. 23, *supra*. Nor is it significant that Amendment No. 1645 *did* delete the phrase that immediately followed the phrase "or the debtor's attorney" from the committee version of the bill. That phrase related to an entirely different subject matter—comments, objections, and guidelines by the United States Trustees regarding fee applications—and that phrase was separated from the phrase "or the debtor's attorney" by a comma. It is exceedingly unlikely that the statute's drafters, whose specific intent was to make "improvements and modifications from the initial sections adopted by the committee" (140 Cong. Rec. at S4507), failed to notice that they were deleting the phrase "or the debtor's attorney" from the statute, either at the time of the deletion or during the five months leading up to the final passage of the legislation.

4. Petitioner also relies (Pet. Br. 28-29) on the House Report to H.R. 5116 and post-enactment statements by Senator Metzenbaum remarking that the United States Trustees would develop guidelines for "fee applications" under the 1994 amendments to 28 U.S.C. 586(a)(3)(A). H.R. Rep. No. 835, 103d Cong., 2d Sess. 51 (1994); 140 Cong. Rec. S14,597 (daily ed. Oct. 7, 1994) (Sen. Metzenbaum). As an initial matter, the cited House Report related to a bill that contained no

changes to Section 330 of the Code, see note 8, *supra*, and therefore has little bearing on Congress's intent in passing Section 330 as amended. Moreover, nothing in Senator Metzenbaum's statement suggests that chapter 7 debtors' attorneys may receive compensation from the estate. As discussed, Section 330 permits the award of fees to examiners, trustees, and professional persons, as well as chapter 12 and 13 debtors' attorneys, all of whom must submit "fee applications" subject to the United States Trustees' Guidelines. See 28 C.F.R. Pt. 58, App. A.

Senator Metzenbaum's statements also refute the notion that Congress intended the 1994 amendments to "*increase* the compensation paid to counsel," as suggested by petitioner (Pet. Br. 3). In fact, Senator Metzenbaum commented that, "throughout the process of crafting a viable bankruptcy reform proposal, I have reiterated that there is one problem in particular that we must fix—professional fees in bankruptcy." 140 Cong. Rec. at S14,597. The Senator explained that earlier hearings had "revealed a number of examples of how lawyers suck the financial life out of companies by charging exorbitant and often unnecessary fees." *Ibid.* "In light of these abuses," Senator Metzenbaum stated that he was "particularly pleased that [his] proposal relating to professional fees is included in the act." *Ibid.* In short, neither those statements, nor any other piece of legislative history, shows that Congress unquestionably intended to authorize a chapter 7 debtor's attorney to be awarded fees from the bankruptcy estate.

5. Petitioner also argues (Pet. Br. 14-16, 36-42) that Congress would not have eliminated the rights of any debtor's attorney to seek fees without an affirmative statement by members of Congress in the legislative

history. The 1994 amendments to Section 330, however, did not make the seismic shift asserted by petitioner, see pp. 33-35, *infra*, and the NACBA, the group who presumably would have been affected by the omission of the phrase "or the debtor's attorney," did not oppose the amendments because of the specific grant of authority to chapter 12 and 13 debtors' attorneys to seek fees. In those circumstances, Congress's silence is hardly surprising. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("[A]lthough the number of actions comprehended by a literal interpretation of [the statute] is no doubt substantial, the number would not appear so large as ineluctably to have provoked comment in Congress.").

Moreover, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison*, 446 U.S. at 592; accord *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385, n.2 (1992) ("Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning.").

Petitioner similarly argues that the Court should "not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." Pet. Br. 36 (citing *Cohen* v. *de la Cruz*, 523 U.S. 213, 221 (1998) (quoting *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990)). That canon is inapposite here. The Court has invoked that principle to interpret terms in the Bankruptcy Code of 1978 that were unclear on their face or to resolve issues not explicitly addressed by the text. *Cohen*, 523 U.S. at 221; *Dewsnup* v. *Timm*, 502 U.S. 410, 419-420 (1992); *Pennsylvania Dep't of Pub. Welfare*, 495 U.S. at 563; *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 245-246 (1989). That principle has never been invoked to reinsert a phrase that Congress specifically struck in an amendment to the Code. Because the omission of "the debtor's attorney" in Section 330(a)(1) is plain on its face in removing the statutory basis for awarding counsel fees to chapter 7 debtors' attorneys, the revised statute is controlling. See *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 22 (2000) ("[T]he Code generally incorporates pre-Code practice *in the absence of explicit revision.*") (emphasis added); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 10 (2000) ("[P]re-Code practice informs our understanding of the language of the Code, [but] cannot overcome that language. It is a tool of construction, not an extratextual supplement.") (citation and internal quotation marks omitted); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 546 (1994) ("[W]here the meaning of the Bankruptcy Code's text is itself clear, its operation is unimpeded by contrary * * * prior practice.") (citation and internal quotation marks omitted).

D. Enforcing Section 330(a)(1) As Written Furthers Reasonable Policy Objectives

1. Congress's preclusion of fee awards to chapter 7 debtors' attorneys advances legitimate policy goals without adversely affecting the administration of bankruptcy cases, and petitioner's apocryphal allegations to the contrary are without merit. The amendment did not, as petitioner repeatedly suggests (Pet. Br. 5, 14, 15, 19, 30, 36) result in a "profound" or "radical" "sea

change" in bankruptcy practice by preventing an award of fees to all debtor's counsel. Such a change presumably would have garnered an objection by the NACBA during the consideration of the 1994 amendments, but no such objection was forthcoming. As discussed, Section 330(a)(4)(B) expressly authorizes a court to award fees to attorneys for chapter 12 and 13 debtors. 11 U.S.C. 330(a)(4)(B) (see pp. 17-18, *supra*). The Code also permits a former debtor's attorney to be awarded fees when he is employed by the trustee, including in a chapter 7 case. 11 U.S.C. 327(e), 330(a)(1) (see p. 20, *supra*).

In addition, Section 330(a)(1) authorizes compensation to attorneys employed by debtors-in-possession under the reorganization provisions of chapter 11. The Code gives chapter 11 debtors-in-possession "all" statutory powers, rights, and duties of a trustee, except the right to be paid as a trustee. 11 U.S.C. 1107(a); see also 11 U.S.C. 1106. The chapter 11 debtor-in-possession's rights thus include the trustee's right to retain counsel under Section 327 "to represent or assist the trustee in carrying out the trustee's duties." 11 U.S.C. 327(a). Indeed, the Code is explicit in providing that an attorney who was retained by a chapter 11 debtor-in-possession before the filing of a petition "is not disqualified from employment under section 327." 11 U.S.C. 1107(b). Counsel who are retained by chapter 11 debtors-in-possession thus have express statutory authority to seek fees from the estate as "a professional person employed under section 327." 11 U.S.C. 330(a)(1).[9]

[9] Petitioner argues (Pet. Br. 21-22) that an award of fees to counsel for a chapter 11 debtor-in-possession conflicts with an interpretation of the statute that gives "full effect" to the deletion of the phrase "the debtor's attorney." Petitioner is mistaken. The Code unambiguously includes attorneys within the category of "professional persons" who may be retained by the trustee, 11 U.S.C. 327(a), or the chapter 11 debtor-in-possession with the same rights and powers of the trustee, 11 U.S.C. 1107, and the Code unambiguously authorizes compensation to such "professional person[s]" in Section 330(a)(1).

2. Substantial policy reasons support Congress's choice to exclude attorneys fees in chapter 7 cases, and chapter 11 cases where a trustee has been appointed, while permitting estate funds to be used to pay attorneys for debtors-in-possession under chapter 11 and individual debtors in chapters 12 and 13. Debtors-in-possession in chapter 11, like debtors in chapters 12 and 13, pursue along with creditors the common goal of crafting and adopting a repayment plan to pay creditors from an estate that includes post-petition assets and income. Because only the chapter 11 debtor-in-possession is authorized to propose a plan initially, 11 U.S.C. 1121(a), (b) and (c), its counsel's assistance in developing a plan benefits the creditors who are paid from post-petition income and assets. 11 U.S.C. 1122-1129. The same is true for chapters 12 and 13, under which debtors remain in possession of all property of the estate and have the responsibility to propose post-petition repayment plans. 11 U.S.C. 1203, 1207(b), 1221, 1303, 1304, 1306(b), 1321. Because those chapters include post-petition assets in the pool of potential recovery, Congress rationally could have determined to authorize estate funds to be paid to attorneys for debtors in proceedings under those chapters as compensation for their services in assisting the debtor to develop a repayment plan for the benefit of creditors.

A case under the liquidation provisions of chapter 7 is fundamentally different from cases under chapters 11,

12, and 13. A chapter 7 debtor does not administer or control the estate on behalf of creditors. That function is instead performed by the trustee, who is appointed in all chapter 7 cases, 11 U.S.C. 701, and who represents the estate on behalf of creditors, pp. 20-21, *supra*. Moreover, the chapter 7 debtor does not propose a repayment plan. Rather, he "surrender[s] * * * all property of the estate" to the trustee, 11 U.S.C. 521(4), who liquidates the debtor's nonexempt assets for the benefit of the estate's creditors, 11 U.S.C. 704(1), 726.

Significantly, as discussed, the Code gives a trustee who needs legal assistance in administering or liquidating a chapter 7 estate authority to seek court approval to retain counsel. Section 327(a) thus permits "the trustee, with the court's approval, [to] employ one or more attorneys * * * that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." 11 U.S.C. 327(a). And Section 327(e) permits the trustee to retain the former debtor's counsel for a special purpose when in the best interest of the estate.

Additionally, every dollar taken from the chapter 7 estate reduces the amount of funds available for creditors. Because the size of a chapter 7 estate is cast in stone as of the date of the filing of the petition, 11 U.S.C. 727(b), chapter 7 is a zero-sum game. Any diversion of funds from a chapter 7 estate to pay for a debtor's personal attorney reduces the amount of estate funds available to pay creditors. In those circumstances, it was reasonable for Congress to prohibit the siphoning of finite assets in chapter 7 cases by preventing chapter 7 debtors from using estate funds to pay the bills of their personal attorneys.

At the same time, the lack of authorization to use *estate* funds to pay counsel for a chapter 7 debtor does not prevent the debtor from hiring an attorney, as suggested by petitioner (Pet. Br. 2). Quite to the contrary, subject to certain limited exceptions, all assets and income acquired by a chapter 7 individual debtor after the petition is filed belong to the debtor. 11 U.S.C. 541(a)(5) and (6), 726, 727(b). An individual debtor typically will have post-petition funds, particularly his or her salary, that the debtor may use to pay counsel for any post-petition legal services. Similarly, when a corporate chapter 7 debtor is being liquidated, the Code does not restrict the corporation's former shareholders or officers from using their personal funds to pay for legal services in order to further their personal interests.[10]

3. Petitioner argues (Pet. Br. 30-36) that, without access to estate funds, bankruptcy lawyers will be discouraged from representing debtors in performing

---

[10] Similar policy reasons support the absence of authority to use estate funds to compensate the debtor's counsel in the unusual case where a chapter 11 trustee is appointed "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management" or because the appointment is in "the interest of creditors." 11 U.S.C. 1104(a)(1) and (2). In those circumstances, the debtor loses its powers over the estate, including the sole right under Section 1121(b) to propose an initial reorganization plan and the rights and powers of a trustee under Sections 327(a), 1106, and 1107 to retain professional persons. It is thus entirely appropriate that the debtor should not be in a position to siphon funds from the estate to pay the debtor's attorney—yet that is the result that would be permissible under petitioner's interpretation. As discussed in the text, moreover, the Code does not restrict the use of post-petition earnings by individual debtors, 11 U.S.C. 541(a)(6), and the Code permits the trustee to retain the debtor's counsel under Section 327(e).

their statutorily imposed duties in the over one million chapter 7 cases filed each year. For several reasons, however, it is the experience and considered view of the United States Trustees, whom Congress has charged with supervising the administration of bankruptcy cases (28 U.S.C. 586(a)(3)), that enforcing Section 330(a)(1) as written has no appreciable detrimental impact upon the administration of chapter 7 bankruptcy cases.[11]

First, the right to seek chapter 7 debtors' counsel fees from the bankruptcy estate has no practical effect in the overwhelming majority of chapter 7 cases. The data that the United States Trustees maintain on chapter 7 cases in the regions they supervise reveal that 96% of chapter 7 cases closed during 2002, *i.e.*, 1,001,697 of the 1,041,065 chapter 7 cases, had no assets in the estate to pay anything to counsel (or creditors for that matter). Thus, it is only in the remaining 4% of chapter 7 cases—less than 40,000 cases annually—that the amendment limits the ability of the chapter 7 debtor's counsel to seek fees from the estate. In those instances, however, Congress has made the rational choice of preserving those funds for creditors and of requiring the chapter 7 debtor to use non-estate, post-

[11] Chapter 7 filing data maintained by the United States Trustees support the conclusion that enforcing Section 330(a)(1) as written does not unduly discourage chapter 7 filings. In the years 1999 and 2000, chapter 7 filings declined nationally. Those filings declined at a lower rate, however, in the Fifth and Eleventh Circuits, which have enforced the statute as written. *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414 (5th Cir. 1998); *In re Am. Steel Prods., Inc.*, 197 F.3d 1354 (11th Cir. 1999). Similarly, in 2001, while chapter 7 filings increased nationally, such filings in the Fifth and Eleventh Circuits increased at a higher rate than the national average.

petition funds to pay for counsel if needed, or to comply with the provisions of Section 327(e) that permit retention of the debtor's counsel by the trustee. See pp. 20, 36-37, *supra*.

Second, the vast majority of chapter 7 debtors who have retained counsel, both before and after Congress amended Section 330, have paid their attorney a flat fee *prior* to filing bankruptcy to compensate the attorney for the typical services provided by counsel. Teresa A. Sullivan et al., *As We Forgive Our Debtors* 23 (1999) ("Because most attorneys insist on being paid in advance, the debtor must find some money for fees and filing before bankruptcy is possible. Some people are literally saving up for their bankruptcies."); Amy L. Good & Dean P. Wyman, *Representing Consumer Debtors: Fiduciary Duties of Counsel*, Prac. Law., Mar. 1999, at 33 ("Chapter 7 attorneys are generally paid a one-time fee immediately before the filing of the bankruptcy petition."); Stanley B. Bernstein et al. *Collier Compensation, Employment and Appointment of Trustees and Professionals in Bankruptcy* ¶ 3.02[1], at 3-2 (2001) ("In the majority of [chapter 7] cases, the debtor's counsel will accept an individual or a joint consumer chapter 7 case only after being paid a retainer that covers the 'standard fee' [which Bernstein estimates as between $750 and $850 in 2001] and the cost of filing the petition.").

Those fees routinely compensate counsel for his work in a chapter 7 case, most of which is completed *before* the petition is filed and the debtor's non-exempt assets become part of the estate under 11 U.S.C. 541. "Proceedings under Chapter 7 differ from cases under other Chapters of the Code in that the bulk of the legal and fact-finding work is done *before* the petition is filed." Rosemary E. Williams, *Bankruptcy Practice*

Handbook § 5:1, at 5-4 (2d ed. 2002); accord *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1064 (Thomas, J., dissenting) ("In many Chapter 7 cases, there is little for the debtor's attorney to do after the petition is filed.").

The Code imposes very limited duties on a chapter 7 debtor. The debtor must complete a bankruptcy petition, a schedule of assets and liabilities, a statement of Financial Affairs, and a disclosure of debts secured by real property. 11 U.S.C. 521(1) and (2); Bankr. R. 4002; 11 U.S.C. App. Official Forms 1, 6, 7. Those duties generally may be performed before the debtor files for bankruptcy. The debtor also must cooperate with the trustee, surrender all property of the estate to the trustee, and appear at any discharge hearing. 11 U.S.C. 521(3)-(5); Bankr. R. 4002(2) and (3). Additionally, the debtor must attend an initial meeting of creditors where he may be asked questions to make sure that he accurately reported assets and liabilities on the bankruptcy filings. 11 U.S.C. 341. Thus, where counsel is retained in chapter 7, the attorney typically analyzes the debtor's financial condition, advises the debtor whether to file bankruptcy, prepares schedules for filing, and appears at the initial meeting of creditors. *Representing Consumer Debtors*, *supra*, at 40.

Petitioner asserts (Pet. Br. 1) that "[t]he debtor" has a duty to "maximize the value of the estate." The decision cited by petitioner, *Louisiana World Exposition* v. *Federal Insurance Co.*, 858 F.2d 233, 246 (5th Cir. 1988)), however, involves a chapter 11 debtor-in-possession, which has the duty of a trustee to manage the estate on behalf of creditors, 11 U.S.C. 1106, 1107(a), 1108. That duty has no application to debtors in chapter 7, who have neither the right nor obligation to control or manage the estate. 11 U.S.C. 323(a), 521(4).

For similar reasons, petitioner errs in attempting to show (Pet. Br. 6-7, 30-31) that the services he performed—such as his work in reviewing proofs of claims, in connection with the adversary complaint, and in investigating flood damage to the estate property—are illustrative of essential services by chapter 7 debtors' attorneys. The chapter 7 *trustee*, not the debtor, reviews proofs of claims, 11 U.S.C. 704(5), reduces to money the property of the estate, 11 U.S.C. 704(1), and acts to preserve the estate's assets, 11 U.S.C. 704(1) and (2). There was thus no need for petitioner to perform those services, which should have been performed by the trustee or counsel retained by the trustee (and subject to the trustee's direction, not the debtor's) under the specific provisions of Section 327.[12]

Based on the limited and generally pre-petition nature of the duties of a chapter 7 debtor, it is the United States Trustees' experience that chapter 7 debtors' counsel routinely receive flat fees before the bankruptcy petition is filed, even in those circuits that allow chapter 7 debtors' counsel to seek fees in "asset" cases (i.e., those relatively few cases in which the chapter 7 estate actually contains some assets for distribution). Indeed, only the most imprudent attorney would fail to secure payment before commencing work for a client who is entering chapter 7. Regardless of the

---

[12] Some of petitioner's services were potentially adverse to the estate's interests. Petitioner observes (Pet. Br. 6), for example, that post-conversion he explained to the debtor, a defunct corporation, how it could attempt to reconvert the case to chapter 11. Petitioner's time records also suggest that he drafted a notice of appeal from the order converting the case to chapter 7. Pet. Br. App. 13a. Petitioner was therefore performing services that apparently were designed to benefit the debtor's equity holders, not the estate that petitioner no longer represented.

outcome of this case, the United States Trustees fully expect debtors' counsel in chapter 7 cases to continue to charge a flat fee in advance for their services, rather than work for free and then face the uncertain prospect of seeking judicial approval for an award of fees from the assets (if any) of the liquidating estate.

Because chapter 7 counsel are already routinely fully paid for their services up front, petitioner also errs (Pet. Br. 35) in predicting that enforcement of the statute as written will encourage enhanced flat fees that would unduly reduce the size of the estate. In any event, the Code already ensures that any pre-petition fee arrangement must be reasonable. Section 329 requires any attorney representing a debtor, whether or not the attorney "applies for compensation," to disclose all fee arrangements made within one year of the petition and to return any payment that "exceeds the reasonable value" of counsel services. 11 U.S.C. 329(a) and (b). The Code similarly prohibits preferential payments to counsel. 11 U.S.C. 547(b); *In re Pillowtex, Inc.*, 304 F.3d 246, 250 (3d Cir. 2002); *In re First Jersey Secs., Inc.*, 180 F.3d 504, 508-514 (3d Cir. 1999).[13]

[13] Petitioner notes (Pet. Br. 36 n.7) that some States consider funds that are paid to an attorney for services that have not yet been performed to be potentially refundable to the client. In that instance, such funds may be part of the estate when the petition is filed. 11 U.S.C. 541. Any chapter 7 debtor's attorney who practices in those jurisdictions may nonetheless be compensated out of the debtor's post-petition salary or other income for any post-petition services. As discussed, moreover, most services of the chapter 7 debtor's attorney are typically performed pre-petition, *i.e.*, before the creation of the estate, and an attorney can accordingly be paid reasonable compensation for his pre-petition services.

4. Petitioner also speculates (Pet. Br. 33) that an attorney who represents a chapter 11 debtor-in-possession may find himself ethically compelled to "work[] for free" if the case converts to chapter 7. Conversions, however, form only a very small fraction of chapter 7 cases. Records maintained by the United States Trustees indicate that conversions reflect less than 0.26% of chapter 7 cases. Furthermore, counsel may seek in advance to limit the scope of the representation to his services for the chapter 11 debtor-in-possession as approved by the court under Section 327(a). Cf. Model Rules of Professional Conduct Rule 1.2(c) (2002) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."). In any event, there is no reason to think that the chapter 7 debtor's attorney will be saddled with post-petition work in the typical case, see pp. 39-40, *supra*, and Section 327(e) permits retention of the debtor's counsel as needed.

* * * * *

In sum, the statute as enacted by Congress produces reasonable results that are fully consistent with the proper administration of bankruptcy proceedings. Indeed, the United States Trustees have observed no detrimental effects from the 1994 amendments to Section 330(a) on the administration of bankruptcy cases throughout the country, including in the circuits that have enforced the statute as passed by Congress. In light of the United States Trustees' experience and Congress's refusal over the last eight years to amend Section 330 as urged by petitioner, there is no justification for accepting petitioner's extraordinary request to rewrite the Bankruptcy Code.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

PETER D. KEISLER
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

LISA S. BLATT
Assistant to the Solicitor General

JOSEPH A. GUZINSKI
General Counsel

P. MATTHEW SUTKO
Attorney
Executive Office for United States Trustees

AUGUST 2003

APPENDIX

1. Section 327 of Title 11, U.S. Code, provides:

§ 327. Employment of professional persons

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best

interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

2. Section 330 of Title 11, U.S. Code, provides:

§ 330. Compensation of officers

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A)[1] In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including—

[1] So in original.

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

(i) unnecessary duplication of services; or

(ii) services that were not—

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

(5) The court shall reduce the amount of compensation awarded under this section by the amount of any

interim compensation awarded under section 331, and, if the amount of such interim compensation exceeds the amount of compensation awarded under this section, may order the return of the excess to the estate.

(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.

(b)(1) There shall be paid from the filing fee in a case under chapter 7 of this title $45 to the trustee serving in such case, after such trustee's services are rendered.

(2) The Judicial Conference of the United States—

(A) shall prescribe additional fees of the same kind as prescribed under section 1914(b) of title 28; and

(B) may prescribe notice of appearance fees and fees charged against distributions in cases under this title;

to pay $15 to trustees serving in cases after such trustees' services are rendered. Beginning 1 year after the date of the enactment of the Bankruptcy Reform Act of 1994, such $15 shall be paid in addition to the amount paid under paragraph (1).

(c) Unless the court orders otherwise, in a case under chapter 12 or 13 of this title the compensation paid to the trustee serving in the case shall not be less than $5 per month from any distribution under the plan during the administration of the plan.

(d) In a case in which the United States trustee serves as trustee, the compensation of the trustee under this section shall be paid to the clerk of the bankruptcy court and deposited by the clerk into the

United States Trustee System Fund established by section 589a of title 28.

3. Section 331 of Title 11, U.S. Code provides:

§ 331. Interim compensation

A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.

Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

No. 02-693

IN THE

Supreme Court of the United States

John M. Lamie,

Petitioner,

v.

United States Trustee.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

John M. Lamie
BROWNING, LAMIE & GIFFORD, P.C.
P.O. Box 519
Abingdon, VA 24212

Additional counsel listed on inside cover

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

September 10, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

21 pp

Additional counsel:

G. Eric Brunstad, Jr.
P.O. Box 208215
127 Wall St.
New Haven, CT 06520

John A. E. Pottow
Assistant Professor of Law
University of Michigan Law School
625 South State St.
Ann Arbor, MI 48109

Craig Goldblatt
Andrew Currie
WILMER, CUTLER & PICKERING
2445 M St., NW
Washington, DC 20037

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
REPLY BRIEF FOR THE PETITIONER 1
I. The Inherent Ambiguity In Section 330(a), As Amended In 1994, Is Properly Resolved By Concluding That Congress Did Not Intend To Revoke The Century-Old Authority Of Courts To Compensate Counsel For Services Necessary And Beneficial To The Estate. 3
II. Respondent's Contradictory Policy Arguments Do Not Call For A Different Result. 11
CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Chickasaw Nation v. *United States*, 534 U.S. 84 (2001).....2
Conrad, Rubin & Lesser v. *Pender*, 289 U.S. 472 (1933).....3
Dewsnup v. *Timm*, 502 U.S. 410 (1992).....4
Fulman v. *United States*, 434 U.S. 528 (1978).....10
Hartford Underwriters Ins. v. *Union Planters Bank, N.A.*, 530 U.S. 1 (2000).....2
In re Ames Dep't Stores, 76 F.3d 66 (CA2 1996).....20
In re Campbell, 259 B.R. 615 (Bankr. N.D. Ohio 2001).....6
In re Century Cleaning Servs., 195 F.3d 1053 (CA9 1999).....20
In re Kimber, No. 00-14333, 2001 Bankr. LEXIS 1506 (Bankr. D. Colo. Sept. 7, 2001).....6
In re Lang, 127 F. 755 (W.D. Tex. 1904).....3
In re Pineloch Enters., 192 B.R. 675 (Bankr. E.D.N.C. 1996) ...6
Iselin v. *United States*, 270 U.S. 245 (1926).....2
Pennsylvania Dep't of Pub. Welfare v. *Davenport*, 495 U.S. 552 (1990).....4
United Sav. Ass'n v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988).....6
United States Nat'l Bank v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993).....2
United States Trustee v. *Garvey*, 195 F.3d 1053 (CA9 1999)...19
United States v. *Granderson*, 511 U.S. 39 (1994).....2
United States v. *Locke*, 471 U.S. 84 (1985).....2
United States v. *Morton*, 467 U.S. 822 (1984).....6
United States v. *Ron Pair Enters., Inc.*, 489 U.S. 235 (1989).....2
United States v. *Wilson*, 503 U.S. 329 (1992).....10

Statutes

11 U.S.C. 101(18)(B).....17
11 U.S.C. 109(e).....17
11 U.S.C. 109(f).....17

11 U.S.C. 329.....8, 14
11 U.S.C. 330(a).....passim
11 U.S.C. 330(a)(1).....passim
11 U.S.C. 330(a)(2).....6
11 U.S.C. 330(a)(3).....6
11 U.S.C. 331.....5, 6
11 U.S.C. 341.....18, 20
11 U.S.C. 503.....6, 10
11 U.S.C. 521.....16, 18
11 U.S.C. 521(1).....18
11 U.S.C. 521(2).....18
11 U.S.C. 521(3).....18
11 U.S.C. 521(4).....18
11 U.S.C. 521(5).....18
11 U.S.C. 541(a)(1).....14
11 U.S.C. 547-550.....16
28 U.S.C. 586(a)(3)(A).....5, 12
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.....passim
Bankruptcy Act of 1898, ch. 541, 30 Stat. 544.....3

Other Authorities

124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6436.....4
140 Cong. Rec. S14,597 (daily ed. Oct. 7, 1994).....7, 13, 14, 16
Bankruptcy Reform: Hrg. on H.R. 5116 Before the Subcomm. On the Economy and Comm. Law of the House Comm. On the Judiciary, 103d Cong., 2d Sess. (1994).....10, 11
http://www.uscourts.gov/ judicialfactsfigures/table5.2.htm.....17
Laurence Zuckerman, *Judgment Day for a Legal Powerhouse*, N.Y. Times, Sept. 25, 1994, at C2 13

Rules

Bankr. R. 4002.....18
Bankr. R. 4002(4).....16

Bankr. R. 4003 18

Treatises

Collier on Bankruptcy (15th ed. 2002) 4, 9, 10, 14
Norton Bankruptcy Law and Practice (2d ed. 1997 Supp.) 9

REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief demonstrated that 11 U.S.C. 330(a)(1) contains an obvious drafting error with respect to the power of courts to compensate debtors' attorneys. Section 330(a)(1) functions as a series of inextricably intertwined parallel references: "the court may award to a trustee * * * reasonable compensation for actual, necessary services rendered by the trustee"; it may award compensation to "an examiner" for services of the "examiner"; and it may award compensation to "a professional person employed under section 327 or 1103" for services of the "professional person." Section 330(a)(1) also expressly empowers the court to pay reasonable compensation for the services of the debtor's "attorney," but it does not specifically name the attorney as an authorized recipient of the compensation. Congress thus either inadvertently included the attorney in the "providers list" or it inadvertently omitted the attorney from the statute's "payees list."

This case calls on this Court to resolve the ambiguity in Section 330(a)(1) with its standard tools of statutory construction, augmented by the special canons applicable in bankruptcy. This manifestly is *not*, as respondent urges, a case in which one construction or the other can be sustained only on a heightened showing that the statute's literal terms should be ignored as a "scrivener's error." Neither the construction pressed by respondent, nor the contrary view of most courts, permits "[e]nforcing the statute as written." Contra Resp. Br. 6. This Court could adopt respondent's construction only by reading out of Section 330(a)(1) the authority expressly conferred by Congress for bankruptcy courts to pay compensation for the services of the "attorney." Indeed, respondent and the majority below admit that their interpretation renders that central provision "superfluous." *Id.* 16 (quoting Pet. App. 9a). Both parties thus agree that the statute contains a drafting error; the disagreement is what that error is. So neither petitioner nor respondent bears a burden of showing that "Congress unquestionably intended to" adopt its view or "could not have rationally intended" the contrary, for neither position

calls for an interpretation that conflicts with the result genuinely compelled by the literal language. Contra Resp. Br. 5, 31.

Respondent's litany of decisions reiterating the uncontroversial proposition that this Court "does not have '*carte blanche*' to redraft statutes" (Resp. Br. 11 (quoting *United States* v. *Locke*, 471 U.S. 84, 95 (1985))) thus does not advance its position. These cases each involve clear, grammatically correct, and internally consistent statutory language. See, *e.g.*, *Iselin* v. *United States*, 270 U.S. 245, 250 (1926) (noting statute was "evidently drawn with care"); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 240-41 (1989) (citing "coherent and consistent" statutory scheme and "precision" of language and grammar). In contrast, where coherence and consistency are lacking, and where the text of one provision in isolation is ambiguous, this Court looks to the structure of the statute as a whole as well as to other evidence of legislative intent. See, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 90 (2001) (concluding, in light of an internal inconsistency in a statute, that Congress must have made a drafting mistake, and resolving that mistake); *Hartford Underwriters Ins.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6-8 (2000) (looking to "contextual features" of the Bankruptcy Code as well as "pre-Code practice and policy considerations"); *United States* v. *Granderson*, 511 U.S. 39, 44-53 (1994) (considering internal consistency within statute, stated legislative purpose, legislative history, and policy concerns).[1]

---

[1] Even in a traditional "scrivener's error" case – *i.e.*, a case in which the Court must choose between a literal reading of the text and a departure from it, rather than (as in this case) between two alternate means of resolving an inconsistency in the text – this Court will not impose a special, dramatically heightened standard to justify the departure, but rather will "look to the provisions of the whole law, and to its object and policy," to determine Congress's intent. *United States Nat'l Bank* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 545-55 (1993) (citation omitted). Although in *National Bank* the Court noted that "overwhelming evidence" supported its view, it did not suggest that such evidence was required. *Id.* at 462. Contra. Resp. Br. 12.

As petitioner now shows, his reading is supported by each relevant tool of statutory construction. Further, there is no merit to respondent's contention that the omission of the word "attorney" from the payees list in the 1994 amendment to Section 330(a) was purposeful because it furthers supposed policy goals.

I. The Inherent Ambiguity In Section 330(a), As Amended In 1994, Is Properly Resolved By Concluding That Congress Did Not Intend To Revoke The Century-Old Authority Of Courts To Compensate Counsel For Services Necessary And Beneficial To The Estate.

The interpretative question before the Court is straightforward: who has the better reading of Section 330(a)(1)? The answer is plain; indeed, it is not seriously disputed. Stripped of its contention that petitioner must show that the Fourth Circuit's reading is "absurd," respondent does not genuinely contend that its is the superior interpretation.

1. As petitioner's opening brief detailed, Congress carefully considered and expressly addressed the authority of bankruptcy courts to compensate counsel in the Bankruptcy Act of 1898 and the Bankruptcy Code of 1978. Acting specifically to overturn cases reading this Court's General Order 30 to forbid compensation (see Pet. Br. 39 & n.9), Congress in the 1898 Act authorized compensation from estate funds in all forms of bankruptcy for services "rendered in aid of the administration of the estate and the carrying out of the provisions of the Act" (*Conrad, Rubin & Lesser* v. *Pender*, 289 U.S. 472, 476 (1933)). When federal bankruptcy law was thoroughly revised in 1978, there was no serious suggestion in Congress that this power should be repealed; to the contrary, Section 330(a) was adopted to authorize compensation more broadly. Pet. Br. 41-42.

Under the 1898 Act, courts awarded limited fees based on a principle of "severe economy * * * so as to reduce to the lowest minimum the costs of administration." *In re Lang*, 127 F. 755, 757 (W.D. Tex. 1904) (internal citation omitted). In enacting Section 330 in 1978, by contrast, Congress determined that, although fees "should be closely examined by the court,"

"[n]otions of economy of the estate in fixing fees are outdated and have no place in [the] bankruptcy code." 124 Cong. Rec. H11,089 (daily ed. Sept. 28, 1978) (definitive joint statement of floor managers, per Rep. Edwards), *reprinted in* 1978 U.S. Code Cong. & Admin. News 6436, 6442.

Respondent does not contest this history. See Br. 32-33. And although respondent contends that *petitioner* cannot show a pellucid intention by Congress to retain the right to compensate counsel (see *infra* at 5-10), respondent does not argue that there is a clear statement in the text or legislative record of an intent to deviate from past practice. Those concessions are essentially dispositive of the question presented, for respondent's position would clearly work "a fundamental change in the law" that would be "inconsistent with current case law." 3 Collier on Bankruptcy ¶ 330.LH[5] (15th ed. 2002). Indeed, the essence of respondent's textual argument is that the 1994 Act represented a substantial change from prior practice that Congress could not have overlooked. However, this Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990). If not in text, there must be "at least some discussion in the legislative history." *Dewsnup* v. *Timm*, 502 U.S. 410, 419 (1992). Congress adopted the 1994 Act against the backdrop of that settled canon.

Respondent only reinforces the point. It contends that the plain statement canon would apply only if the terms of Section 330(a)(1) "were unclear on their face or to resolve issues not explicitly addressed by the text." Br. 32-33. Respondent reiterates that its sole contention is that "Section 330(a)(1) is plain on its face in removing the statutory basis for awarding counsel fees to chapter 7 debtors' attorneys." *Id.* 33. But as petitioner has shown – and respondent concedes in admitting that its reading renders "superfluous" the courts' statutory authority to pay compensation for the services of the "attorney" (*id.* 16) – the text is ambiguous, not plain. Because there is no clear statement by Congress in the text or the legislative history of an intent to depart from nearly a century of settled bankruptcy

practice in the 1994 amendment (see *infra* at 5-10), Section 330(a)(1) is properly understood to maintain the authority to compensate the debtor's counsel from the assets of the estate.

2. Respondent fails to undermine petitioner's showing that his construction is more faithful to the statutory text. Respondent, like the majority below, principally reasons not from the text of Section 330(a)(1) as currently enacted, but from the contrast between that text and the 1978 version's explicit reference to the debtor's counsel in the payees list. Respondent contends that "[t]he omission is the most direct and obvious means" of limiting the compensation paid for the services provided by debtors' counsel. Resp. Br. 5.

That simply is not so. The "direct" and "obvious" approach would have been to amend not just one isolated reference to the attorney's right to compensation, but all of the provisions relating to that authority (including Section 330(a)'s providers list, 11 U.S.C. 331, and 28 U.S.C. 586(a)(3)(A)), without simultaneously enacting other provisions that necessarily presume the availability of fees for attorneys (11 U.S.C. 330(a)(4)(B)) and that govern the award of those fees (*id.* § 330(a)(4)(A)). Further, as between the payees list and the providers list, if Congress actually intended to eliminate or limit the availability of compensation, it would have amended the latter. But it did not, instead leaving unaltered the court's explicit authority in the providers list to pay "reasonable compensation for actual, necessary services rendered by *the* * * * *attorney*." 11 U.S.C. 330(a)(1) (emphasis added). Congress in 1994 merely omitted a provision that addresses the ministerial act of turning the compensation over to the attorney.

Although Section 330(a) is inartfully phrased on any reading, at least petitioner's interpretation gives meaning to each of its terms. Respondent's contention that petitioner would read additional terms into the statute is incorrect. As just noted, Congress retained in the providers list the power to award compensation for the attorney's services. The 1994 omission of the attorney in the provision addressing the act of transmitting otherwise-authorized compensation is a relatively minor error that would ordinarily be overlooked as unremarkable. In any

event, as petitioner's opening brief explained, compensation is separately authorized by Section 503 of the Bankruptcy Code, which broadly authorizes "payment of administrative expenses to the extent they represent 'the actual, necessary costs and expenses of preserving the estate.'" Pet. Br. 18 (quoting 11 U.S.C. 503). Respondent's brief ignores this font of authority.

3. Petitioner's reading similarly best makes sense of both the statutory structure and its object. Respondent's position is supported, at best, by the omission from the payees list "in isolation," whereas petitioner's reading prevails because it is most consistent with the "statute[] as a whole" (*United States* v. *Morton*, 467 U.S. 822, 828 (1984)), particularly given that construction of the Bankruptcy Code is a uniquely "holistic endeavor" (*United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)). The 1994 amendment to Section 330(a) added provisions that contemplate the continued availability of attorney's fees under Section 330(a)(1). Congress enacted procedures for the court to reduce fee awards on the basis of objections by third parties (Section 330(a)(2)), specific standards for evaluating fee applications (330(a)(3)), threshold requirements for receiving fees (330(a)(4)), and offsetting rules to account for "interim compensation" already awarded (330(a)(5)).[2] Petitioner reads these provisions, as Congress intended them, to govern fee awards to the debtor's attorney under Section 330(a)(1). Congress sought to ensure judicial

[2] Respondent correctly notes that, on its reading, a "debtor's attorney" in Chapters 12 and 13 is *literally* eligible for interim compensation as required by Sections 330(a)(5) and 331. Br. 22. But because Chapter 12 and 13 reorganizations generally involve "relatively standardized services" (*In re Kimber*, No. 00-14333, 2001 Bankr. LEXIS 1506, at *7 (Bankr. D. Colo. Sept. 7, 2001)) paid for with "flat fees" (*In re Pineloch Enters.*, 192 B.R. 675, 678 (Bankr. E.D.N.C. 1996)), there is no *practical* reason Congress would have enacted a provision that contemplates the use of interim compensation for just those cases. See, *e.g.*, *In re Campbell*, 259 B.R. 615, 620 n.3 (Bankr. N.D. Ohio 2001) ("the flat fee of $750 is an amount that many Chapter 13 counsel charge a debtor for handling a routine Chapter 13 case").

scrutiny of fee awards (see, *e.g.*, 140 Cong. Rec. S14,597 (daily ed. Oct. 7, 1994) (Sen. Metzenbaum)) – scrutiny that would be impossible if those fees were eliminated.

Petitioner's position is specifically supported by Congress's 1994 enactment of Sections 330(a)(4)(A) and (B). The former permits the award of fees only for services "necessary to the administration of the case" or "likely to benefit the *estate*" (emphasis added). The latter provides that fees may be awarded to an individual debtor's counsel in cases under Chapters 12 or 13 for "representing the interests of the *debtor*" (emphasis added). Petitioner contends that subsection (a)(4)(A) announces a general rule limiting the availability of fees for, *inter alios*, debtors' attorneys, and that subsection (a)(4)(B) creates a special exception to that general rule which expands the availability of fees under Chapters 12 and 13. By contrast, respondent contends that subsection (a)(4)(A) does not apply to fee awards to the "debtor's attorney" for services benefiting the estate (which it says are not permitted), and that subsection (a)(4)(B) permits limited fees in Chapter 12 and 13 cases. The disagreement matters because if petitioner is correct that the 1994 Act codifies a general rule providing for the availability of attorney's fees in subsection (a)(4)(A), Congress could not have intended to eliminate those very fees in the same statute. Petitioner's reading is superior for several reasons.

First, the text plainly states that subsection (a)(4)(B) is an exception that expands the availability of fees that could otherwise be awarded in Chapter 12 and 13 cases. The limitations on fees in Section 330(a)(4)(A) constitute a general rule applicable to all fees "*[e]xcept* as provided in subparagraph (B)" (emphasis added). Only petitioner's reading treats the provisions of subsection (a)(4)(B) as such an "exception" to the general rule of subsection (a)(4)(A).

Second, Congress could not logically have intended, as respondent supposes, that counsel for Chapter 12 and 13 debtors would be eligible for compensation for services that benefit the "debtor" but *not* for services that benefit only the debtor's "estate." Respondent does not dispute that the *sine qua non* of the availability of fees in bankruptcy has always been benefit to

the estate. See Pet. Br. 24. But under respondent's novel reading, a Chapter 12 or 13 debtor's counsel is inexplicably ineligible for attorney's fees for services that benefit only the estate – for example, those that provide creditors with information regarding the availability of assets to satisfy their claims.

Third, on respondent's view, attorney's fees in Chapter 12 and 13 cases would implausibly not be subject to Section 330(a)(1). Section 330(a)(1) incorporates Section 329, which permits the court to terminate or modify fee agreements. Section 330(a)(1) grants the U.S. Trustee and other parties the right to object to fee applications. And Section 330(a)(1), unlike Section 330(a)(4)(B), confers the right to reimbursement for expenses. Congress could not have intended that each of these provisions would apply to *every* type of fee application in bankruptcy *except* attorney's fee applications filed by individual Chapter 12 and 13 debtors.

Finally, there is no merit to respondent's *expressio unius* argument (Br. 18) that Congress's failure to list Chapter 7 debtors' counsel in subsection (a)(4)(B) implies an intent to eliminate the availability of attorney's fees in such cases. That Congress authorized additional compensation in some Chapter 12 and 13 cases for services that benefit the "debtor" does not suggest a corresponding intention to abandon – and is in fact logically unrelated to – the general authority to pay compensation for services benefiting the "estate."

4. Respondent could, at least conceivably, rescue its reading of the 1994 amendment if it could establish that Congress gave genuine consideration to deleting the courts' longstanding authority to pay counsel. By showing that the omission of the attorney from the payees list was purposeful, respondent arguably could explain Congress's failure to delete the parallel reference in the providers list as an inadvertent oversight in pursuit of this deliberate goal. (Yet it would remain doubtful that Congress would have intended to eliminate the availability of attorney's fees when the 1994 amendment's obvious overriding object was enhancing judicial scrutiny of fees rather than forbidding those fees outright.) The legislative

record, however, makes clear that Congress omitted the "attorney" from the payees list accidentally.

As discussed in the leading bankruptcy treatise, the omission occurred as a result of a final change to a "last minute addition * * * to the 1994 Act." 3 Collier ¶ 330.LH[5], at 330-75. The revision to Section 330(a) occurred on the final day the 1994 Act was considered, along with numerous amendments, by the Senate (April 21, 1994). Five months later, the bill was introduced in the House and passed the next day (October 5, 1994). In only one day (October 6, 1994), it was returned to, and passed by, the Senate. Respondent's emphatic claims that Section 330(a) was pending for "*over five additional months*" before enactment (Br. 27 (emphasis in original)) and was the subject of "over a year of deliberations" (*id.* 29) are thus misleading. The "five months" was a period in which the bill was not pending in either chamber. The "year" refers to the seven-month stretch before the relevant amendment was made to Section 330(a) and the five-month period in which neither the House nor the Senate had the bill before it.

It is also obvious how the inadvertent omission occurred. The reference to the debtor's attorney in the payees list was dropped when the succeeding clause was deleted and then reinserted in another place. The drafter simply struck out too much text, a conclusion reinforced by the fact that the deletion extended to the necessary conjunction "or." See Pet. Br. 25-30. As respondent itself points out, that subsequent clause and the amendment as a whole involved the review of fee applications by the U.S. Trustee, which is "an entirely different subject matter" from the courts' authority to award fees. Br. 30; see also 3 Collier ¶ 330.LH[5], at 330-73; Norton Bankruptcy Law and Practice § 26:5, at 206 (2d ed. 1997 Supp.). Although respondent asserts that "[i]t is exceedingly unlikely that the statute's drafters * * * failed to notice" the omission (Br. 30), the last-minute nature of the change makes it not unlikely at all, as *even respondent* implicitly acknowledges in arguing that Congress inadvertently overlooked its "fail[ure] to make corresponding changes" in the providers list (*id.* 15). Indeed, petitioner's opening brief demonstrated, and respondent does not

contest, that the 1994 amendments introduced numerous other obviously inadvertent errors into the Code. Pet. Br. 27 n.5.

The sequence of the amendment's transformation from a last-minute cut-and-paste job to federal law indicates that this is no more than an instance in which a reorganization caused a statutory reference to be "lost in the shuffle" (*United States* v. *Wilson*, 503 U.S. 329, 336 (1992)), a fact that this Court can and will recognize without some specially persuasive showing that Congress made a scrivener's error (*id.*). Here, as in *Wilson*, "Congress entirely rewrote [the statute] when it changed it to its present form": "It rearranged its clauses, rephrased its central idea * * *, and more than doubled its length." *Id.* Indeed, there is even more reason to recognize that the omission was inadvertent here than there was in *Wilson*, because here the Court can determine "what happened to the [missing] reference" (*id.*): the drafter inadvertently omitted the "attorney" in an entirely unrelated, "last-minute change" (3 Collier ¶ 330.LH[5], at 330-75) to the adjoining clause in the statute. Cf. *Fulman* v. *United States*, 434 U.S. 528, 539 (1978) ("we will not read legislation to abandon previously prevailing law when, as here, a recodification of law is incomplete or departs substantially and without explanation from prior law").[3]

---

[3] Respondent's repeated emphasis that the omission was noted without objection in the House does not support its view that Congress acted purposefully. The cited reference is buried in a single sentence of written testimony for a House hearing that appears in a 718-page hearing record. *Bankruptcy Reform: Hrg. on H.R. 5116 Before the Subcomm. On the Economy and Comm. Law of the House Comm. On the Judiciary*, 103d Cong., 2d Sess. 551 (1994). Respondent's contention that the point was made by the National Association of Consumer Bankruptcy Attorneys (NACBA), which respondent contends is the nation's most expert organization on these questions (Br. 27-28, 32), is genuinely strange. Respondent has either forgotten or decided to ignore that NACBA filed a brief *in this very case* explaining that the Fourth Circuit's refusal to recognize that the omission of "the debtor's attorney" was an inadvertent error that if not recognized as such would have a "pernicious real world effect" on the orderly administration of bankruptcy proceedings. See NACBA Cert. *Amicus* Br. 6. (NACBA's position was stated sufficiently clearly at the cert. stage that it was unnecessary to file a duplicative merits *amicus* brief.) Although respondent contends that NACBA did not oppose the 1994 amendments because it believed the change was not problematic, NACBA's statement makes clear (as does its brief in this case) that the organization believed Congress or the courts would ignore the omission as "inadvertent." *Hrg. on H.R. 5116*, *supra*, at 551.

Respondent's invocation of "subsequent" legislative history is flawed for the reasons set out in petitioner's opening brief, which respondent ignores. The bills that would have corrected the omission of "attorney" contained numerous other provisions that could have caused them not to pass. And given that most courts have deemed the omission unintentional, it is not surprising that Congress found it unnecessary to intervene. See Pet. Br. 30.

II. Respondent's Contradictory Policy Arguments Do Not Call For A Different Result.

Although respondent advances policy arguments that it contends support its position, the fact that those arguments are mutually inconsistent and unsupported by the legislative record demonstrates that respondent's position is at best a *post hoc* rationalization and not an accurate reflection of Congress's intent. That conclusion is reinforced by the undisputed fact that Congress expressly considered and rejected these very policy arguments in enacting Section 330(a) in 1978. On the one hand, respondent hypothesizes that Congress "rationally could have determined" (Br. 6) to eliminate the availability of fees for debtors' attorneys under Section 330(a)(1) in order to prevent attorneys from "siphoning off" estate assets in Chapter 7 cases or as leverage to discourage debtors from pursuing relief under Chapter 7 rather than Chapters 12 and 13. On the other hand, respondent takes the opposite position that such a policy choice would be essentially meaningless because attorneys will still be paid under the Code from the assets of the estate, including in Chapter 7, because (*inter alia*) they may be hired by the trustee.

If Congress had concluded that any of these were genuinely "[s]ubstantial policy reasons" for the 1994 amendment (Resp. Br. 35), it would have pursued them coherently, and those reasons would have been acknowledged *somewhere* in the legislative history, whether by a legislator, by respondent in its own comments on the Act, or by at least a witness. But the entire history of the Act contains not a single instance in which anyone made those arguments, or even expressed more general concern regarding the longstanding availability of Chapter 7 attorney's fees. That silence is deafening here, for respondent is asking this Court to read the last-minute omission of one reference to the "attorney" in Section 330(a)(1) as embodying a significant change in bankruptcy policy that Congress consistently rejected for nearly a century. See *supra* at 3-4.

Further, respondent's claim that it is presenting an "experience[d] and considered view" on these policy matters (Br. 38) – like its quotation of its own public relations materials stating that it "acts in the public interest" (Br. 1 (quoting http://www.usdoj.gov/ust/mission.htm)) – rings hollow. Neither prior to nor in the course of the 1994 revision to Section 330(a)(1) did respondent suggest the change in the availability of fees that it now reads into the statute.

Rather, respondent's position is openly directed at arrogating to itself authority that trustees were *not* granted by Congress. The 1994 amendments to Section 330(a) conferred on the U.S. Trustee the right to review and comment on fee applications, including those submitted by debtors' attorneys. See 11 U.S.C. 330(a)(1), (2). But respondent would convert the amendment into the much broader authority – which the U.S. Trustee has never possessed – to control which attorneys are retained in the first instance. It thus contends that attorneys in Chapter 7 cases may be paid from estate funds *only if hired by the trustee*. See Resp. Br. 6-7. All the available evidence refutes the suggestion that Congress intended such a sweeping expansion of trustees' powers.[4]

---

[4] Respondent's assertion that it is not the *courts* but "the United States Trustees[] who are charged with supervising the administration of bankruptcy cases" (Resp. Br. 7) is contradicted by the very statute respondent cites. The "supervis[ory]" authority of the U.S. Trustees that respondent invokes with respect to attorney's fees does not include acting on fee requests (that is the court's responsibility (see 11 U.S.C. 330(a)) but instead is limited to "reviewing * * * applications filed for compensation and reimbursement under section 330" and "filing with the court" any "comments [or] objections to such application[s]" (28 U.S.C. 586(a)(3)(A)). This responsibility applies "in cases *under chapter 7, 11, 12 or 13.*" *Id.* (emphasis added). But respondent reads Section 330(a) to forbid Chapter 7 debtors from submitting attorney's fee applications.

As petitioner now shows, in the 1994 amendments, Congress was not pursuing the policies suggested by respondent.

1. Respondent opines that the 1994 omission of "debtor's attorney" may have been intended to preserve the assets of the estate because "under petitioner's interpretation" debtors supposedly would "siphon funds from the estate to pay the debtor's attorney" (Br. 37 n.10) and "divert[]" those funds from creditors (*id.* 6). The legislative history on which respondent relies, however, undermines its claim. Although the sponsor of the 1994 amendment (Senator Metzenbaum) expressed concern over excessive attorney's fees being awarded in large corporate reorganizations (140 Cong. Rec. at S14,597), those cases are overwhelmingly Chapter 11 "debtor in possession" proceedings, which is the lone category of cases that respondent contends was *unaffected* by the 1994 amendment. Indeed, the prototypical example cited by Senator Metzenbaum was the Chapter 11 reorganization of Colt Manufacturing. See *id.* (citing Laurence Zuckerman, *Judgment Day for a Legal Powerhouse*, N.Y. Times, Sept. 25, 1994, at C2). Further, respondent quotes Senator Metzenbaum's statement that he was "particularly pleased that [his] proposal relating to professional fees [was] included in the act" (Br. 31), but omits that the proposal was (as the *next sentence* of the Senator's statement explains) not the elimination of fees in any cases but the enactment "in clear and concise terms [of] those factors that must be considered when

deciding the appropriateness of the fee request" (140 Cong. Rec. at S14,597).

As an entirely separate matter, respondent's argument rests on an important misstatement of basic bankruptcy law. The 1978 Act specifically rejected the view that attorney's fees waste estate assets. See *supra* at 3-4. Congress in the 1994 Act then adopted Senator Metzenbaum's proposal to codify the rule that courts may approve fees for services "likely to benefit the debtor's estate" or "necessary to the administration of the case." 11 U.S.C. 330(a)(4)(A). See generally 3 Collier ¶ 330.03[3], at 330-25. Respondent inexplicably ignores not only this central provision but also the many cases demonstrating that courts rigorously scrutinize fee applications. See Pet. Br. App. 33a-35a. If a fee application involves an actual "diver[sion]" of funds that should be paid to creditors, it will be denied.

Further, on respondent's reading, Chapter 7 attorney's fees will *still* be paid from the assets of the estate, albeit in a way Congress could not have intended. Respondent contends that attorneys will be retained by the trustee and/or will receive a pre-petition retainer from the debtor. Br. 36-37. The funds to pay an attorney hired by the trustee are paid from the estate under Section 330(a)(1). Similarly, the funds for a pre-petition retainer would otherwise form part of the estate. 11 U.S.C. 541(a)(1). By encouraging the use of such retainers, respondent's position perversely reduces the court's authority to scrutinize payments to attorneys. See Pet. Br. 35-36 (explaining that pre-petition retainers are subject to less rigorous review under Section 329(b) than are fees under Section 330(a)). This case – in which the bankruptcy and district courts agreed that the retainer petitioner was paid by his client was "reasonable" without scrutinizing the services petitioner provided – is a perfect example.

In any event, respondent's reading of the 1994 amendment to Section 330(a) would not reduce the availability of fees only under Chapter 7. It would more broadly eliminate the authority to pay debtors' counsel for services necessary and beneficial to the estate in most bankruptcies: those under Chapters 7, 12, and 13, as well as under Chapter 11 if the debtor is "out of

possession." Respondent repeatedly mischaracterizes the issue as implicating Chapter 7 alone, acknowledging only at the end of its brief that it reads the 1994 amendment as eliminating the power to pay such fees not merely "in chapter 7 cases" but also in "chapter 11 cases where a trustee has been appointed." Br. 35. Even this statement omits that courts would have no authority to pay fees either (i) to counsel for individual Chapter 12 and 13 debtors for services that benefit the estate but not the debtor or (ii) in any cases involving Chapter 12 business debtors. See 11 U.S.C. 330(a)(4)(B).

2. Nor does respondent have a persuasive explanation for why Congress in 1994 would have intended to eliminate the availability of attorney's fees in many Chapter 7 cases while simultaneously expanding the availability of fees under Chapters 12 and 13. Throughout the history of federal bankruptcy law, the authority to award fees has applied uniformly to all forms of bankruptcy, and there is no substantial reason Congress would have intended for the first time to, *sub silentio*, draw the distinction hypothesized by respondent.

Respondent contends that in cases under Chapters 12 and 13, as well as when a Chapter 11 debtor is "in possession," the debtors "pursue along with creditors the common goal of crafting a repayment plan to pay creditors from an estate that includes post-petition assets and income." Br. 35. By contrast, under Chapter 7, the estate is administered by a trustee and involves liquidation rather than repayment. *Id.* 36. But respondent has done no more than identify commonalities and distinctions among some kinds of bankruptcy. Innumerable other lines could be drawn. For example, Chapter 7 and 11 cases involve larger estates while Chapters 12 and 13 are subject to defined income limits. Chapters 7, 11, and 12 involve businesses and therefore more complex reorganizations while cases under Chapter 13 only involve individuals. But none of these comparisons, including those made by respondent, relates to whether Congress intended fees to be paid from the estate.

Respondent's argument that "Chapter 7 is a zero-sum game in which any funds diverted from the estate to pay attorneys reduce the amount of funds available to pay creditors" (Br. 6)

misapprehends how Chapter 7 operates. Neither the claims against the estate nor the assets of the estate are finally established at the point a bankruptcy petition is filed. Rather, the debtor and the trustee often work to reduce the claims against the estate and maximize the value of the assets. Debtor's counsel assists the trustee in pursuing adversary proceedings that will generate funds for the estate, including avoiding "preferences" to increase the size of the estate for creditors (see, *e.g.*, 11 U.S.C. 547-550), cooperates with the trustee examining proofs of claim filed against the estate (see Bankr. R. 4002(4)), and takes steps to ensure that the bankruptcy process operates smoothly (such as providing information to the affected parties) to ensure that the estate's funds are properly distributed to creditors (see 11 U.S.C. 521).

3. Respondent alternatively emphasizes that one goal of the 1994 amendments to Section 330(a) was to encourage individual debtors eligible for treatment under Chapters 12 and 13 to reorganize under those provisions. Br. 26-27. That fact is no help to respondent because that objective was pursued through the enactment of Section 330(a)(4)(B), not any change to Section 330(a)(1). See *supra* at 6-9. Respondent imagines that Congress might have omitted the prior authorization to pay debtors' counsel from subsection (a)(1) as the "stick" to accompany the "carrot" of newly enacted subsection (a)(4)(B), hypothesizing that "Congress rationally could have sought to * * * encourage the use of chapter 13 by precluding debtors' attorneys from seeking compensation from chapter 7 estates." Br. 26-27. Respondent offers only one piece of support for this unusual theory, in which Congress begrudges compensation for services that are "necessary" or "beneficial" to the estate. It is Senator Heflin's statement that his amendment to Section 330(a) would encourage Chapter 13 filings. Br. 24-25 (quoting 140 Cong. Rec. S4507 (daily ed. Apr. 20, 1994)). But respondent concedes that this statement was made "before the phrase 'or the debtor's attorney' was deleted from the bill" (*id.* 24), as it refers instead to the provision that became subsection (a)(4)(B).

Further, only petitioner's construction is consistent with Congress's goal of encouraging resort to Chapters 12 and 13.

Under any reading, Section 330(a)(4)(B) provides that *individual* Chapter 12 and 13 debtors may compensate their counsel for services that benefit the *debtor*. But respondent's reading prohibits attorney's fees in Chapters 12 and 13 in important circumstances, and it is therefore less likely to encourage use of Chapters 12 and 13. Only petitioner's reading permits *business* Chapter 12 filers to pay fees and furthermore permits debtors to compensate their counsel for services that benefit only the debtor's *estate*.

Respondent would also read the statute as a blunderbuss that is inconsistent with the statute's supposed purpose of encouraging individual debtors to pursue relief under Chapters 12 and 13. Chapters 12 and 13 are limited to, respectively, "family farmers with regular annual income" (11 U.S.C. 109(f)) and "individuals with regular income" but certain maximum debts (*id.* § 109(e)). Of *particular* importance, the great majority of the approximately 40,000 Chapter 7 filings that respondent contends involve ongoing attorney's fees under Section 330(a)(1) are likely to be more complicated business liquidations *ineligible* for treatment under Chapters 12 and 13. It is no coincidence that the 40,000 figure is roughly comparable to the annual average of approximately 34,500 Chapter 7 bankruptcy filings by businesses. See http://www.uscourts.gov/judicialfactsfigures/table5.2.htm. This case perfectly illustrates the misfit between the elimination of the availability of fees under Section 330(a)(1) and the goal of encouraging resort to Chapters 12 or 13. Because petitioner's client is a company, neither Chapter 12 nor Chapter 13 was ever an option.

At bottom, respondent ignores the many respects in which its interpretation does not fit with the statutory goals it imagines Congress might have been pursuing. Just a few examples demonstrate the point. If Congress had actually concluded that fees are merited in Chapter 12 and 13 cases (Br. 35), why would it have eliminated them for services that benefit the estate (as opposed to the debtor) in such cases or for all services in Chapter 12 business cases? If Congress had actually intended to draw a distinction based on whether creditors would be paid from post-petition assets (*id.* 35), why would it have eliminated

fees in Chapter 11 cases in which the debtor is out of possession? And if Congress had actually concluded that it was sufficient that individual debtors under Chapter 7 and debtors generally under Chapter 11 could pay their attorneys from pre- or post-petition assets (*id.* 37 & n.10), why would it have not applied the same approach in all forms of bankruptcy?

4. Petitioner's opening brief collected not "apocryphal allegations" (contra Resp. Br. 33) but an array of authorities – including the leading bankruptcy treatise and the judges in this very case – recognizing that respondent's construction will have genuine adverse consequences for bankruptcy administration. See Pet. Br. 31-34. Respondent's reading produces a "very powerful disincentive * * * to attorneys to accept Chapter 7 cases in the first place, or to provide anything beyond the most perfunctory required post-petition services." Pet. App. 42a.

The limited data collected by respondent does not undermine that showing. Respondent acknowledges that its position would prohibit the payment of fees from the estate in the approximately 40,000 Chapter 7 cases each year in which the estate has assets (Br. 38), which is a significant number. Moreover, these are precisely the cases – those in which the bankruptcy will actually be *litigated* rather than a simple liquidation – in which the presence of counsel is most important to bankruptcy administration.

Although respondent characterizes the duties of a debtor as "very limited" (Br. 40), it cites an array of responsibilities, many of which can be performed only with the assistance of counsel. Respondent acknowledges the obligations to attend a creditors meeting and to be prepared to answer questions regarding the assets and liabilities of the estate (11 U.S.C. 341); file a list of creditors and schedule of assets and liabilities (*id.* § 521(1)); file a statement regarding secured assets (*id.* § 521(2)); cooperate in the execution of the trustee's duties (*id.* § 521(3)); surrender relevant books and records (*id.* § 521(4)); appear at any discharge hearings (*id.* § 521(5)); cooperate in examining proofs of claim and identify real property (Bankr. R. 4002); and identify exempt property (*id.* R. 4003). Petitioner's opening brief also collected an array of case law, which respondent

ignores, demonstrating the many services performed by debtor's counsel, including in Chapter 7 cases, as in *United States Trustee* v. *Garvey*, 195 F.3d 1053, 1060 (CA9 1999), in which the debtor's attorney "filed the conversion petition, prepared schedules, amended reports, a statement of affairs, and a Rule 2015 report, communicated with creditors, and participated in 2004 examinations." The court accordingly recognized that "[i]nterpreting the ambiguous provision in § 330(a)(1) so as to eliminate the possibility of post-petition compensation for Chapter 7 debtor's attorneys would significantly alter the ability of Chapter 7 debtors to secure counsel in order to perform these services – a fundamental change in bankruptcy law." See generally Pet. Br. App. 29a-32a. The notion that an individual could undertake these tasks without a lawyer, much less that an officer of a corporation could do so in a complex bankruptcy proceeding, is not even a serious argument. Importantly, these are duties of the *debtor* that cannot be performed by an attorney retained by the trustee to represent the *estate*.

This very case is a perfect illustration. Respondent cannot, and does not, contest that the debtor in this case – a small mine-services company – would have been completely incapable of undertaking the responsibilities performed by petitioner, as required by the Code. See Pet. Br. 5-7, 30. Respondent does argue that *some* of these tasks "should have been performed by the trustee or counsel retained by the trustee." Br. 41. Many others, however, indisputably were the responsibility of the debtor's counsel. Further, respondent's view would produce a substantially less efficient bankruptcy system. Petitioner, as the attorney with the relationship with the debtor and the knowledge of the case, was best positioned to promptly resolve issues relating to the status of the estate. That is no doubt why both the judge and the trustee turned to him. Nor does anything in the Code preclude the debtor's counsel from undertaking such tasks, as even respondent implicitly acknowledges in arguing (Br. 37) that debtor's counsel can be paid for post-petition services through a pre-petition retainer or post-bankruptcy assets. And requiring the trustee regularly to secure judicial approval to hire the debtor's counsel would be a profound waste of resources.

Thus, although respondent quotes Judge Thomas's statement that "[i]n many Chapter 7 cases, there is little for the debtor's attorney to do after the petition is filed" (Br. 40 (quoting *In re Century Cleaning Servs.*, 195 F.3d 1053, 1064 (CA9 1999) (dissenting opinion))), it omits his *conclusion* that the distinction between classes of debtors drawn by respondent "makes no sense" (*id.* (quoting *In re Ames Dep't Stores*, 76 F.3d 66, 782 (CA2 1996))) and that, while "in the typical 'no asset' Chapter 7 case, there is little activity after the filing of the petition other than attendance at the section 341 hearing,"

> in *many cases*, the debtor's attorney is called upon to represent the debtor in post-petition adversary proceedings, Rule 2004 examinations, and in reaffirmation hearings. In more complex Chapter 7 bankruptcies, post-petition demands on the debtor's counsel *increase dramatically*. Categorical exclusion of fees can only result in denial of access to justice, with debtors unrepresented or under-represented. The increase in pro se cases, and in cases which become pro se after the petition is filed, does not aid the administration of our bankruptcy system.

Id. (emphases added).

* * * *

This case calls on the Court to interpret an inherently ambiguous statute. Of the two possible readings, petitioner's best comports with the text of the specific provision and the statute as a whole. It also best makes sense of the course of last-minute events that led to the introduction of the ambiguity. And, particularly important in the context of bankruptcy law, it comports with longstanding bankruptcy practice, from which Congress gave no indication of an intent to depart. The judgment of the court of appeals should accordingly be reversed.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's opening brief, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

John M. Lamie
BROWNING, LAMIE & GIFFORD, P.C.
P.O. Box 519
Abington, VA 24212

G. Eric Brunstad, Jr.
P.O. Box 208215
127 Wall St.
New Haven, CT 06520

Craig Goldblatt
Andrew Currie
WILMER,CUTLER& PICKERING
2445 M St., NW
Washington, DC 20037

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

John A. E. Pottow
Assistant Professor of Law
University of Michigan Law School
625 South State St.
Ann Arbor, MI 48109

September 10, 2003